EXHIBIT 1

Pacitti v. Macy's
C.A.3 (Pa.),1999.

United States Court of Appeals,Third Circuit.
Joanna PACITTI, a minor, by Joseph Pacitti, and Stella Pacitti, her parents and guardians, Appellants
v.
MACY'S; Macy's East, Inc.
No. 98-1803.

Argued: July 15, 1999
Filed Oct. 5, 1999.

Parents, on behalf of daughter, sued sponsor of talent search, which daughter had won, alleging fraudulent misrepresentation, equitable estoppel, public policy tort, and breach of implied covenant of good faith and fair dealing, and seeking punitive damages, after daughter was replaced as star of play before Broadway opening. Following removal from state court, the United States District Court for the Eastern District of Pennsylvania, James T. Giles, J., 1998 WL 512938, limited requested discovery and granted summary judgment to sponsor, and parents appealed. The Court of Appeals, Alito, Circuit Judge, held that: (1) an enforceable contract under Pennsylvania law was entered into where store, as sponsor of contest, offered girls the opportunity of becoming "Broadway's New 'Annie' " by participating in and winning auditions, and girl participated in and won the auditions; (2) contract was ambiguous as to whether the prize included performing as "Annie" on Broadway for at least some period; (3) notice of appeal from the district court's final judgment, specifying only order granting summary judgment to defendants, was sufficient to support review of the court's earlier discovery order; and (4) plaintiffs were entitled to production of sponsor's communications with, and relationship to, the producers regarding the terms of the contract that the producers intended to offer the successful contestant and the pecuniary benefit sponsor received as a result of the search.

Reversed and remanded.

William Stafford, Senior District Judge, filed a dissenting opinion.

West Headnotes

[1] Federal Courts 170B 766

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk766 k. Summary Judgment. Most Cited Cases

Federal Courts 170B 802

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk802 k. Summary Judgment. Most Cited Cases
Court of Appeals exercises plenary review over a grant of summary judgment and applies the same legal standard used by the district court, evaluating the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.

[2] Contracts 95 16

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16 k. Offer and Acceptance in General. Most Cited Cases

Contracts 95 189

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189 k. Scope and Extent of Obligation. Most Cited Cases
Under the law of Pennsylvania, the promoter of a

prize-winning contest, by making public the conditions and rules of the contest, makes an offer, and if before the offer is withdrawn another person acts upon it, this results in an enforceable contract and the promoter is bound to perform his promise. Restatement (Second) of Contracts § 24.

[3] Contracts 95 ⚿16

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16 k. Offer and Acceptance in General. Most Cited Cases
Parties entered into an enforceable contract under Pennsylvania law where store, as sponsor of contest, offered girls the opportunity of becoming "Broadway's New 'Annie' " by participating in and winning auditions, and girl participated in and won the auditions.

[4] Federal Courts 170B ⚿755

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk754 Review Dependent on Whether Questions Are of Law or of Fact
170Bk755 k. Particular Cases. Most Cited Cases
Determining whether a contract is ambiguous is a legal question, and review is plenary.

[5] Contracts 95 ⚿147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases
The purpose of contract interpretation is to ascertain and effectuate the objectively manifested intentions of the contracting parties.

[6] Contracts 95 ⚿176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases
In interpreting a contract, the court first determines whether the contract is ambiguous; if the contract as a whole is susceptible to more than one reading, the factfinder resolves the matter, but where it is unambiguous and can be interpreted only one way, the court interprets the contract as a matter of law.

[7] Contracts 95 ⚿143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases
A contract is "ambiguous" if it is capable of more than one reasonable interpretation.

[8] Contracts 95 ⚿147(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

Contracts 95 ⚿169

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k169 k. Extrinsic Circumstances. Most Cited Cases
In determining whether a contract is ambiguous, the court assumes the intent of the parties to an instrument is embodied in the writing itself, and when the words are clear and unambiguous, the intent is to be discovered only from the express language of the agreement, but this does not mean that the court is confined to the four corners of the written document; rather, the court reads the contract in the context in which it was made.

[9] Contracts 95 ⚿147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases
To determine contracting parties' intentions, the court may consider, among other things, the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning.

[10] Contracts 95 ⚿176(9)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(9) k. Subject-Matter. Most Cited Cases

Contracts 95 ⚿189

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189 k. Scope and Extent of Obligation. Most Cited Cases
Contract resulting when store, as sponsor of contest, offered girls the opportunity of becoming "Broadway's New 'Annie' " by participating in and winning auditions, and girl participated in and won the auditions, was ambiguous as to whether the prize included performing as "Annie" on Broadway for at least some period, and thus its interpretation should be left to the fact finder, where sponsor at no point revealed that the winner of the search would receive only the opportunity to sign a standard Actors' Equity contract with the producers, under which winner was replaced before the Broadway opening, despite clause vesting "sole discretion" in the producers, the use of the word "audition," as opposed to "contest," in the official rules, and the fact that the winner executed a standard Actors' Equity contract with the producers.

[11] Contracts 95 ⚿170(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k170 Construction by Parties
95k170(1) k. In General. Most Cited Cases
Courts may consider the subsequent actions of the contracting parties to ascertaining the parties' intentions and resolving any ambiguities.

[12] Contracts 95 ⚿189

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189 k. Scope and Extent of Obligation. Most Cited Cases
Official rules of contest to select star of play, releasing contest sponsor from liability "with respect to the audition(s)," did not allow sponsor to escape liability arising from alleged failure of prize to conform to that offered.

[13] Federal Courts 170B ⚿666

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk666 k. Requisites and Sufficiency; Defects. Most Cited Cases

Federal Courts 170B ⚿769

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk768 Interlocutory, Collateral and Supplementary Proceedings and Questions
170Bk769 k. On Appeal from Final Judgment. Most Cited Cases
Plaintiffs' notice of appeal from the district court's final judgment, specifying only order granting summary judgment to defendants, was sufficient to support review of the court's earlier discovery order, as discovery order was sufficiently related to the order granting summary judgment, the final judgment rule barred plaintiffs from appealing the discovery order until the district court granted defendant's motion for summary judgment, defendant had notice of plaintiffs' intent to appeal the discovery order since

plaintiffs sought review of the entire judgment and argued the merits of the discovery order in their opening appellate brief, and there was no prejudice to defendant. F.R.A.P.Rule 3(c), 28 U.S.C.A.

[14] Federal Courts 170B ⚷571

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk571 k. Necessity in General. Most Cited Cases

Federal Courts 170B ⚷769

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk768 Interlocutory, Collateral and Supplementary Proceedings and Questions
170Bk769 k. On Appeal from Final Judgment. Most Cited Cases
Since only a final judgment or order is appealable, the appeal from a final judgment draws in question all prior non-final orders and rulings. F.R.A.P.Rule 3(c), 28 U.S.C.A.

[15] Federal Courts 170B ⚷666

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk666 k. Requisites and Sufficiency; Defects. Most Cited Cases

Federal Courts 170B ⚷768.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk768 Interlocutory, Collateral and Supplementary Proceedings and Questions
170Bk768.1 k. In General. Most Cited Cases
Court of Appeals reviews orders not specified in the notice of appeal where: (1) there is a connection between the specified and unspecified order, (2) the intention to appeal the unspecified order is apparent, and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues.

[16] Federal Courts 170B ⚷820

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and Discovery. Most Cited Cases
District court's discovery order is reviewed for abuse of discretion.

[17] Federal Civil Procedure 170A ⚷1272.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1272.1 k. In General. Most Cited Cases
The federal rules allow broad and liberal discovery. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[18] Fraud 184 ⚷3

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In General. Most Cited Cases
To succeed on a claim for fraudulent misrepresentation under Pennsylvania law, plaintiffs must establish the following elements: (1) a misrepresentation, (2) a fraudulent utterance, (3) an intention to induce action on the part of the recipient, (4) a justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as a proximate result.

[19] Fraud 184 ⚷27

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k27 k. Fraudulent Representations or

Concealment as to Particular Facts. Most Cited Cases
To prove the elements of fraudulent misrepresentation under Pennsylvania law against sponsor of contest to select new star for play, after winner of contest was replaced before Broadway opening, winner had to demonstrate that sponsor fraudulently misrepresented that the successful participant would perform on Broadway, that it did so with the intent to induce participation in the talent search, and that winner relied to her detriment upon the misrepresentation.

[20] Federal Civil Procedure 170A 1272.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1272.1 k. In General. Most Cited Cases
In action for fraudulent misrepresentation against sponsor of talent search to select "Broadway's New 'Annie' " based on failure to disclose that winner would be offered only standard Actors' Equity contract, under which winner was replaced before Broadway opening, winner was entitled to production of sponsor's communications with, and relationship to, the producers regarding the terms of the contract that the producers intended to offer the successful contestant and the pecuniary benefit sponsor received as a result of the search, as relevant to sponsor's knowledge and motives, particularly where sponsor submitted its contract with the producers in support of summary judgment, despite contention that the only relevant representations were those to which winner was privy. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[21] Federal Civil Procedure 170A 1341

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)2 Proceedings
170Ak1341 k. In General. Most Cited Cases
Only if one of the factors set forth in Rule of Civil Procedure is present should the district court limit the number of depositions. Fed.Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A.

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Before: GREENBERG, ALITO, Circuit Judges, and STAFFORD, District Judge[FN*]

FN* The Honorable William H. Stafford, Jr., United States District Judge for the Northern District of Florida, sitting by designation.

OPINION OF THE COURT

ALITO, Circuit Judge:
Stella and Joseph Pacitti, on behalf of their daughter, Joanna Pacitti ("plaintiffs"), appeal the District Court's grant of summary judgment in favor of Macy's East, Inc. ("Macy's") on their state-law contract and tort claims arising from Macy's role as promoter and host of "Macy's Search for Broadway's New 'Annie' " (the "Search"). Plaintiffs also appeal the District Court's order limiting the scope of discovery. For the reasons that follow, we reverse on both grounds and remand for further proceedings.

I.

In May 1996, the producers of "Annie," the Classic Annie Production Limited Partnership (the "producers"), and Macy's, a retail department store chain, entered into an agreement under which Macy's agreed to sponsor the "Annie 20th Anniversary Talent Search." *See* App. at 129a32a. Specifically, Macy's agreed to promote the event and to host the auditions at its stores in the following locations: New

York City, Boston, Atlanta, Miami, and King of Prussia, Pennsylvania. *See id.* at 129a-30a. The producers agreed to select one finalist from each regional store to compete in a final audition at Macy's Herald Square store in New York City. *See id.* at 130a. The producers also agreed to offer the winner of the final audition "a contract for that role to appear in the 20th Anniversary Production of Annie ..., subject to good faith negotiations and in accordance with standard Actors' Equity Production Contract guidelines" (the "standard actors' equity contract").[FN1] *Id.*

> FN1. The Actors' Equity Association requires producers to attach its standard "Agreement and Rules Governing Employment under the Production Contract" to "all contracts where production is bonded as a Bus and Truck Tour."*See* App. at 141a. As we discuss below, that contract provides, among other things, that the producer retains the authority to replace the actor at any time so long as the actor is compensated through the term of the contract. *See id.* at 168a.

Macy's publicized the Search in newspapers and in its stores in the five regional locations. All of the promotional materials referred to the event as "Macy's Search for Broadway's New 'Annie.' "*See id.* at 59a-83a. Plaintiffs learned of the Search from an advertisement in the *Philadelphia Inquirer* that stated, in pertinent part:

If you are a girl between 7 and 12 years old and 4'6" or under, the starring role in this 20th Anniversary Broadway production and national tour could be yours! Just get your hands on an application ... and bring it to the audition at Macy's King of Prussia store.... Annie's director/lyricist ... will pick the lucky actress for final callbacks ... at Macy's Herald Square. Annie goes on the road this fall and opens on Broadway Spring 1997.

Id. at 208a.

In June 1996, Joanna, then eleven years old, and her mother picked up an application at the King of Prussia store. The application form announced:

Annie, America's most beloved musical[,] and Macy's, the world's largest store, *770 are conducting a talent search for a new "Annie" to star in the 20th Anniversary Broadway production and national Tour of Annie....

Id. at 22a. The reverse side of the application form contained the "Official Rules [of] Macy's Search for Broadway's New 'Annie.' "*See id.* at 23a. In addition to explaining the two-part audition process, the official rules provided, in relevant part:

1. All participants must be accompanied by a parent or legal guardian and must bring completed application forms to one of the Macy's audition locations ... and be prepared to audition....

2. The "Annie" selected at the "Annie-Off-Final Callback" will be required to work with a trained dog. The tour commences in Fall 1996, with a Broadway opening tentatively scheduled for Spring 1997, [and] with a post-Broadway tour to follow.

* * *

6. [Y]ou and your parent or legal guardian are responsible for your own conduct, and hereby release Macy's ... and the Producers ... from any liability to or with regard to the participants and/or her parent or legal guardian with respect to the audition(s).

* * *

8. All determinations made by the Producers or their designated judges are being made at their sole discretion and each such determination is final.

Id.[FN2] Unlike Macy's contract with the producers, neither the official rules[FN3] nor any *771 of the promotional materials included a provision informing the participants that the winner of the Search would receive only the opportunity to enter into a standard actors' equity contract with the producers.

> FN2. Because the District Court relied heavily on the official rules in rendering its decision, we provide them here in full:
>
> 1. All participants must be accompanied by a parent or legal guardian and must bring completed application forms to one of the Macy's audition locations on the dates and times listed on the reverse of this form and be prepared to audition.

Only one parent or legal guardian may accompany each participant.

2. The "Annie" selected at the "Annie-Off-Final Callback" will be required to work with a trained dog. The tour commences Fall 1996, with a Broadway opening tentatively scheduled for Spring 1997, [and] with a post-Broadway tour to follow. Parent(s) or guardian(s) will accompany tour children. Additional information on arrangements for the final call-back and show rehearsals and performances will be provided to each regional finalist selected to attend the "Annie-Off-Final Callback" audition in New York City.

3. By participating, you agree to follow these Official Rules and you consent to the taking of a photograph, for identification purposes only. You also agree that Macy's (and/or a Macy's designee) may use your name, likeness, biographical data and/or [sic] voice for advertising, promotional activities and/or publicity, whether or not related to the audition and also acknowledge that such use requires neither any further permission nor any compensation. Participants who are members of Actors' Equity Association must identify themselves to an event representative as such, and will not be audio or video taped during the audition process. All application forms are the sole property of Macy's[,] and Macy's is not responsible for any lost, destroyed, incomplete, illegible or otherwise deficient or unusable application forms.

4. In order to participate in the audition, you must complete and return the reverse application form, be a U.S. resident, between the ages of 7 and 12 as of June 2, 1996[,] and you must be available for the final audition on Thursday, August 8, 1996[,] in New York City.

5. Macy's may require that you verify your date of birth and may require that you provide a certified copy of your birth or baptismal certificate, school records or other document that states your date of birth.

6. Participants' parents or legal guardians are responsible for any tax obligations and expenses you may incur (such as the cost of travel or hotel accommodations) for the initial audition. The Classic Annie Production Limited Partnership (the "Producers") will provide travel and hotel accommodations to finalists selected for the "Annie-Off" call-back in Macy's Herald Square on Thursday, August 8, 1996. In addition, you and your parent or legal guardian are responsible for your own conduct, and hereby release Macy's East, Inc., its affiliates and each of their respective officers, directors, employees, agents, successors and assigns (for purposes of this Paragraph 6, all included within the term "Macy's") and the Producers and their successors and assigns from any liability to or with regard to the participants and/or her parent or legal guardian with respect to the audition(s).

7. The audition is subject to all applicable laws and regulations.

8. All determinations made by the Producers or their designated judges are being made at their sole discretion and each such determination is final.

App. at 23a.

FN3. Throughout the remainder of this opinion, we refer to the official rules and the application form as the "official rules."

Joanna and her mother signed the official rules and proceeded to the initial audition at the King of Prussia store. Macy's publicized the event by placing balloons, signs, pins, and other promotional materials advertising "Macy's Search for Broadway's New 'Annie' " throughout the store. After auditioning hundreds of "Annie" hopefuls, the producers selected Joanna as the regional finalist. In a press release, Macy's announced Joanna's success to the public:

"One in Ten She'll Be a Star!!! Macy's Brings Local Girl One Step Closer Towards 'Tomorrow' to Become Broadway's New 'Annie.' "*Id.* at 77a. The press release further provided:

Philadelphia's own, twelve year-old **Joanna Pacitti**, *will join nine other talented girls for a final audition* to cast the title role in the 20th Anniversary production of the classic Tony Award-winning musical, ***Annie***, coming to Broadway this season.... Ten finalists, most of whom were selected from over two thousand "Annie" hopefuls ..., will vie for the chance to become Broadway's new "Annie."

Id. (emphasis in original).

At the producers' expense, Joanna and her mother traveled to New York City for Joanna to participate in the "Annie-Off-Final Call Back" at Macy's Herald Square store. After auditioning for two days, the producers selected Joanna to star as "Annie" in the 20th Anniversary Broadway production. Again, Macy's announced Joanna's success to the public, referring to her as "Broadway's New 'Annie.' " *See id.* at 59a-83a.

Joanna and her mother met with the producers and signed an "Actors' Equity Association Standard Run-of-the-Play Production Contract." *See id.* at 133a-68a. Consistent with the Actors' Equity Association's rules governing production contracts, the producers retained the right to replace Joanna with another actor at any time as long as they paid her salary through the term of her contract. *See id.* at 168a.

For nearly a four-month period, Joanna performed the role of "Annie" in the production's national tour. In so doing, Joanna appeared in over 100 performances and in six cities. In February 1997, approximately three weeks before the scheduled Broadway opening, the producers informed Joanna that her "services [would] no longer be needed," and she was replaced by her understudy. *Id.* at 12a.

On March 21, 1997, plaintiffs filed suit against Macy's in Pennsylvania state court, alleging breach of contract and the following tort claims: (1) fraudulent misrepresentation, (2) equitable estoppel, (3) public policy tort, (4) breach of implied covenant of good faith and fair dealing, and (5) punitive damages. *See id.* at 15a-21a. In particular, plaintiffs alleged that Macy's failed to deliver the prize it had offered, i.e., the starring role of "Annie" on Broadway, and that Macy's knew it could not award this prize but promoted its ability to do so nonetheless. *See id.* Macy's subsequently removed the suit to federal district court based on diversity.

During discovery, plaintiffs sought to uncover information on the relationship between Macy's and the producers and on the pecuniary benefit Macy's received from sponsoring the Search. Macy's objected*772 to their request, and the District Court limited discovery to "what promises, if any, were made by defendant prior to and at the final audition ... in New York City that the person selected at that audition would appear in the role as Annie." *Id.* at 38a. Plaintiffs moved for reconsideration, and the District Court denied that motion on December 19, 1997. *See id.* at 50a.

Macy's then moved for summary judgment, contending that it did not deprive Joanna of any prize she had been promised and that her rights were limited by the terms of her contract with the producers. *See id.* at 24a, 126a. In support of its motion, Macy's proffered, among other things, its contract with the producers, which, as explained above, specified that the successful contestant would receive only the opportunity to enter into a standard actors' equity contract with the producers.

The District Court granted summary judgment in favor of Macy's. *See Pacitti v. Macy's*, No. Civ. A. 97-2557, 1998 WL 512938 (E.D.Pa. Aug.18, 1998). Addressing plaintiffs' breach of contract claim, the District Court concluded that the contract was unambiguous and capable of only one reasonable interpretation-i.e., that Macy's offered only an audition for the opportunity to enter into a standard actors' equity contract with the producers for the title role in "Annie." *See id.* at *3-4. Therefore, the Court rejected plaintiffs' contention that Macy's offered Joanna a guaranteed Broadway opening, *see id.* at *4, and the Court concluded:

Plaintiffs received the benefit of their bargain by being offered a contract with the Producers for the "Annie" role, in exchange for Ms. Pacitti participating in "Macy's Search for Broadway's New Annie." ...When the Producers offered a contract to Plaintiffs consistent with the terms of the Official

Rules[,] any possible obligation Macy's had to Plaintiffs was fully met.

Id.

After rejecting plaintiffs' breach of contract claim, the District Court turned to their tort claims. *See id.* Reasoning that each cause of action was predicated upon the assertion that Macy's offered Joanna the role of "Annie" on Broadway, and concluding that Macy's made no such representation, the District Court granted Macy's motion for summary judgment on these claims as well. *See id.*

Plaintiffs then took this appeal. In their notice of appeal, plaintiffs state only that they appeal from the District Court's order granting summary judgment for Macy's. *See* App. at 235a. In this appeal, however, plaintiffs also argue that the District Court abused its discretion in limiting the scope of discovery.

II.

[1] A. We turn first to plaintiffs' argument that the District Court erred in granting summary judgment in favor of Macy's on the breach of contract claim. We exercise plenary review over a grant of summary judgment and apply the same legal standard used by the District Court. *See Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir.1994). In so doing, we evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See id.* We conclude that the District Court erred.

[2] Under the law of Pennsylvania,[FN4] "[t]he promoter of a [prize-winning] contest, by making public the conditions and rules of the contest, makes an offer, and if *773 before the offer is withdrawn another person acts upon it, the promoter is bound to perform his promise." *Cobaugh v. Klick-Lewis, Inc.*, 385 Pa.Super. 587, 561 A.2d 1248, 1249 (Pa.Super.1989) (quoting Annotation, Private rights and remedies growing out of prize-winning contests, 87 A.L.R.2d 649, 661). An offer has been defined as "a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Cobaugh*, 561 A.2d at 1249 (citing *Restatement (Second) of Contracts* § 24; 8 P.L.E. Contracts § 23). The offer to award a prize results in an enforceable contract if the offeree performs the required action before the offer is withdrawn. *See id.*

FN4. Because the laws of New York and Pennsylvania are identical in all aspects material to the resolution of this case, and because the parties do not assert a preference for the law of one jurisdiction over the other, we, like the District Court, will not engage in a choice of law analysis. *See Pacitti v. Macy's*, No. Civ. A. 97-2557, 1998 WL 512938, at *2 n. 2 (E.D.Pa. Aug.18, 1998). In addressing plaintiffs' breach of contract claim, however, we refer only to the law of Pennsylvania.

[3][4] Here, the parties entered into an enforceable contract under Pennsylvania law. Macy's offered girls the opportunity of becoming "Broadway's New 'Annie' " by participating in and winning the auditions, and Joanna participated in and won the auditions. Therefore, the dispute in this appeal relates to the parties' interpretation of that contract and, in particular, to the question whether the District Court properly found that the contract is unambiguous. Determining whether a contract is ambiguous is a legal question, and our review is plenary. *See Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir.1980).

[5][6][7] The purpose of contract interpretation is to ascertain and effectuate the objectively manifested intentions of the contracting parties. *See Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir.1994) (citing *Mellon Bank*, 619 F.2d at 1009). The court first determines whether the contract is ambiguous. *See Hullett*, 38 F.3d at 111 (citing *Stendardo v. Federal Nat'l Mortgage Ass'n*, 991 F.2d 1089, 1094 (3d Cir.1993)). A contract is ambiguous if it is capable of more than one reasonable interpretation. *See Mellon Bank*, 619 F.2d at 1011 (defining ambiguity as an "[i]ntellectual uncertainty... [or] the condition of admitting two or more meanings, of being understood in more than one way, or referring to two or more things at the same time...."). If the contract as a whole is susceptible to more than one reading, the factfinder resolves the matter. *See Hullett*, 38 F.3d at 111. On the other hand, where it is unambiguous and can be interpreted only one way, the court interprets the

contract as a matter of law. *See id.*

[8][9] In determining whether a contract is ambiguous, the court "assumes the intent of the parties to an instrument is 'embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement.'" *Id.* (citing *County of Dauphin v. Fidelity & Deposit Co.*, 770 F.Supp. 248, 251 (M.D.Pa.), *aff'd*, 937 F.2d 596 (3d Cir.1991)). This does not mean, however, that the court is confined to the "four corners of the written document." *Hullett*, 38 F.3d at 111 (citing *Mellon Bank*, 619 F.2d at 1011). Rather, the court reads the contract in the context in which it was made. *See Hullett*, 38 F.3d at 111 (citing *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659, 662 (1982)). Therefore, to determine the parties' intentions, the court may consider, among other things, "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." *Hullett*, 38 F.3d at 111 (quoting *Mellon Bank*, 619 F.2d at 1011).

In this case, the District Court concluded that the contract was unambiguous and capable of only one reasonable interpretation-i.e., that Macy's offered only an audition for the opportunity to enter into a standard actors' equity contract with the producers for the title role in "Annie." *See Pacitti v. Macy's*, No. Civ. A. 97-2557, 1998 WL 512938, at *3-4 (E.D.Pa. Aug.18, 1998). In reaching this conclusion, the Court noted that the official rules repeatedly referred to the promotion as an *774 "audition," as opposed to a "contest," and vested "sole discretion" in the producers to make final determinations. *See id.* at *3. Hence, the District Court found that "Plaintiffs could not reasonably have relied upon Macy's as the selector of 'Annie' or as a controller of the Producers," *id.*, and that "it was obvious that Macy's was promoting auditions for the benefit of the Annie Producers." *Id.* at *4. The District Court also found that plaintiffs "knew that while Macy's was promoting the search, it was not the entity that would be contracting with the new 'Annie.' " *Id.* at *3. Rather, the District Court noted, plaintiffs "wholly expected" to sign a standard actors' equity contract with the producers and, according to the Court, their expectation is evidenced by the fact that they executed such a contract after Joanna won the Search. *See id.* The Court explained further:

> The contract which she signed with the Producers did not guarantee her that she would open on Broadway, but instead considered her to be like every other actor in "Annie" who had won their role through an audition process but could be replaced at the Producers' discretion pursuant to the standard equity contract.

Id. Therefore, the District Court rejected plaintiffs' contention that Macy's offered Joanna a guaranteed Broadway opening, *see id.* at *4, and the Court concluded:

> Plaintiffs received the benefit of their bargain by being offered a contract with the Producers for the "Annie" role, in exchange for Ms. Pacitti participating in "Macy's Search for Broadway's New Annie." ...When the Producers offered a contract to Plaintiffs consistent with the terms of the Official Rules[,] any possible obligation Macy's had to Plaintiffs was fully met.

Id.

[10] Applying the standards discussed above, we conclude that the District Court erred in determining that the contract was capable of only one reasonable interpretation. Plaintiffs' interpretation-that Macy's offered the prize of performing as "Annie" on Broadway for at least some period-is a reasonable alternative to that of the District Court.

The official rules and promotional materials referred to the promotion as "Macy's Search for Broadway's New 'Annie.' " The official rules provided that the producers and Macy's were "conducting a talent search for the new 'Annie' to star in the 20th Anniversary Broadway production," and the advertisement in the *Philadelphia Inquirer* promised that "[t]he starring role in this 20th Anniversary Broadway Production and National Tour could be yours!" From these assertions, one reasonably could conclude that Macy's offered the winner of the Search the prize of starring as "Annie" on Broadway. In addition, the use of the word "audition," as opposed to "contest," in the official rules does not make plaintiffs' interpretation unreasonable. As plaintiffs assert:

> [T]he word 'audition' refers to the process a contestant must undergo *before* she can 'win' the

prize.... It follows, one would think, the girl selected after the 'final audition' has won something more than an 'audition.'

Appellants' Br. at 20-21 (emphasis in original).

Moreover, *it is not unreasonable to conclude that* Macy's had the ability to offer the winner of the Search the starring role on Broadway. The official rules provided that:

Annie, America's most beloved musical[,] and Macy's, the world's largest store, are conducting a talent search for a new "Annie" to star in the 20th Anniversary Broadway production and national Tour of Annie....

App. at 22a (emphasis added). That passage suggests that Macy's and the producers jointly promoted and hosted the Search. It does not indicate any relative imbalance of authority in favor of the producers. Nor do we believe that the clause *775 vesting "sole discretion" in the producers supports only the interpretation that the producers were "the sole determiners of the *Annie role.*" *Pacitti,* 1998 WL 512938, at *3 (emphasis added). Rather, that clause can be interpreted more narrowly as only restricting Macy's from selecting the winner of the auditions.

Further, Macy's at no point revealed-either through its printed materials or other means-that the winner of the Search would receive only the opportunity to sign a standard actors' equity contract with the producers.[FN5] Nor do the facts suggest that plaintiffs-none of whom was a member of the Actors' Equity Association-had any knowledge greater than that provided by Macy's.[FN6] We do not believe that Macy's role was so "obvious" that it need not have limited its offer to public, and we find it telling that Macy's contract with the producers contained qualifications on the prize to be offered. Therefore, we conclude that it was reasonable for plaintiffs to believe that Macy's offered the starring role of "Annie" on Broadway.

> FN5. Macy's should have manifested its intention in the contract by limiting or qualifying its offer accordingly. *See Cobaugh,* 561 A.2d at 1250-51 (noting that it is the duty of the drafter of the contract to exercise due care in explaining its offer so as not to mislead the public); *Hutchison v. Sunbeam Coal Corp.,* 513 Pa. 192, 519 A.2d 385, 390 n. 5 (1986) ("[I]n determining the intention of the parties to a written contract, the writing must be construed against the party drafting the document.").
>
> FN6. We disagree with the District Court's assertion that based on the general release clause, it is clear that plaintiffs "knew that while Macy's was promoting the search, it was not the entity that would be contracting with the new 'Annie.' "*Pacitti,* 1998 WL 512938, at *3. That clause provides:
>
> > [Y]ou and your parent or legal guardian are responsible for your own conduct, and hereby release Macy's ... and the Producers ... from any liability to or with regard to the participants and/or her parent or legal guardian with respect to the audition(s).
> >
> > App. at 23a. As is clear from the language quoted above, that clause not only releases Macy's but also the producers.

[11] We reach this conclusion even though plaintiffs executed a standard actors' equity contract with the producers. Courts may consider the subsequent actions of the contracting parties to ascertain the parties' intentions and resolve any ambiguities. *See Department of Transp. v. Mosites Constr. Co.,* 90 Pa.Cmwlth. 33, 494 A.2d 41, 43 (Pa.Commw.1985) ("The intention of the parties must control the interpretation of the contract but if the intent is unclear from the words of the contract, we may examine extrinsic evidence including consideration of the subject matter of the contract, the circumstances surrounding its execution and the subsequent acts of the parties."); *see also In re Estate of Herr,* 400 Pa. 90, 161 A.2d 32, 34 (1960). Joanna's contract with the producers, however, does not demonstrate plainly and unambiguously that when plaintiffs contracted with Macy's, they "wholly expected" to execute a standard actors' equity contract with the producers.

For these reasons, we hold that the contractual language is ambiguous, and its interpretation should be left to the factfinder for resolution. Accordingly,

the District Court erred in concluding that Macy's is entitled to judgment as a matter of law.

[12] B. Macy's also contends that plaintiffs' claims are barred by the express release in the official rules. The official rules provide, in pertinent part:

[Y]ou and your parent or legal guardian are responsible for your own conduct, and hereby release Macy's ... and the Producers ... from any liability to or with regard to the participants and/or her parent or legal guardian with respect to the audition(s).

App. at 23a. That paragraph simply releases Macy's from liability "with respect to the audition(s)." It does not allow Macy's to escape liability arising from this action. We therefore reject Macy's contention.

*776 C. With respect to the tort causes of action, plaintiffs maintain that the District Court erred in granting summary judgment. As noted above, the District Court dismissed these claims because it had rejected the predicate upon which each claim was based, i.e., that Macy's offered the successful participant the role of "Annie" on Broadway. *See Pacitti*, 1998 WL 512938, at *4. Because we conclude that the contract reasonably may be interpreted to make such an offer, we reverse on these claims as well and remand for further proceedings.

III.

We now turn to plaintiffs' contention that the District Court abused its discretion by limiting the scope of discovery.[FN7] Specifically, plaintiffs argue that the District Court's discovery order precluded them from uncovering facts relevant to their fraudulent misrepresentation claims. Macy's asserts that review of this issue is improper and, in the alternative, that the District Court's order was a proper exercise of discretion. We conclude that review is appropriate and that the District Court abused its discretion.

FN7. Citing *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir.1986), and *Mannington Mills, Inc. v. Congoleum Indus., Inc.*, 610 F.2d 1059, 1073 (3d Cir.1979), plaintiffs also argue that they were not given sufficient opportunity to conduct discovery to withstand Macy's motion for summary judgment and that therefore reversal of the summary judgment order is required. In response, Macy's contends that because plaintiffs failed to file a Rule 56(f) motion, they have not preserved this issue for appeal. Because we are reversing on the breach of contract claim, we need not address this issue.

[13] A. As a preliminary matter, we must determine whether we have jurisdiction to review the discovery order. Macy's argues that we lack jurisdiction because plaintiffs' notice of appeal does not indicate that they are appealing the discovery order. In their notice of appeal, plaintiffs specify only the District Court's order of August 19, 1998, granting summary judgment for Macy's. *See* App. at 235a.[FN8] We conclude that plaintiffs' notice of appeal from the District Court's final judgment is sufficient to support the Court's earlier discovery order.

FN8. The notice of appeal provides, in full:

> Notice is hereby given that Joanna Pacitti, a minor, by Joseph Pacitti and Stella Pacitti, her parents and guardians, plaintiffs in the above-named case, hereby appeal to the United States Court of Appeal[s] for the Third Circuit from an order granting summary judgment in favor of defendant Macy's and Macy's East and against plaintiffs which dismissed the action as to defendant Macy's and Macy's East. The said Order hereby appealed from was entered in this action on the 19th day of August, 1998.
>
> App. at 235a.

[14] Federal Rule of Appellate Procedure 3(c) states that the notice of appeal must "designate the *judgment, order or part thereof* appealed from." Fed. R.App. P. 3(c). However, we liberally construe the requirements of Rule 3(c). *See Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 858 (3d Cir.1990); *Williams v. Guzzardi*, 875 F.2d 46, 49-50 (3d Cir.1989). Thus, we have stated:

[W]hen an appellant gives notice that he is appealing from a final order, failing to refer specifically to

earlier orders disposing of other claims or other parties does not preclude us from reviewing those orders.

Shea v. Smith, 966 F.2d 127, 129 (3d Cir.1992) (citing *Murray v. Commercial Union Ins. Co.*, 782 F.2d 432, 434 (3d Cir.1986)). And we have explained: "[S]ince ... only a final judgment or order is appealable, the appeal from a final judgment draws in question all prior non-final orders and rulings." *Drinkwater*, 904 F.2d at 858 (exercising jurisdiction over unspecified order because finality doctrine barred plaintiff from appealing that order until after the entry of final judgment) (citing *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1253 (3d Cir.1977) (per curiam)); *see* *777 *also Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 144 (3d Cir.), *cert. denied*, 525 U.S. 823, 119 S.Ct. 66, 142 L.Ed.2d 52 (1998) ("[Liberal] treatment is particularly appropriate where the order appealed is discretionary and relates back to the judgment sought to be reviewed."); *Tabron v. Grace*, 6 F.3d 147, 153 n. 2 (3d Cir.1993) ("[W]e construe notices of appeal liberally as covering unspecified prior orders if they are related to the specified order that was appealed from."); Wright, Miller & Cooper, *Federal Practice & Procedure*, Jurisdiction 3d § 3949.4 ("[A] notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders.").

[15] We have reviewed orders not specified in the notice of appeal where: (1) there is a connection between the specified and unspecified order, (2) the intention to appeal the unspecified order is apparent, and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues. *See Polonski*, 137 F.3d at 144 (exercising jurisdiction over order granting attorney's fees even though notice of appeal specified only the order granting summary judgment); *Tabron*, 6 F.3d at 153 n. 2 (reviewing order denying request for counsel even though notice of appeal specified only the order granting summary judgment).

Review is appropriate here. The discovery order is sufficiently related to the order granting summary judgment. The final judgment rule barred plaintiffs from appealing the discovery order until the District Court granted Macy's motion for summary judgment. Plaintiffs' notice of appeal from the final judgment, therefore, brought up for review the earlier interlocutory discovery order. *Cf. Drinkwater*, 904 F.2d at 858; *Polonski*, 137 F.3d at 144; *Tabron*, 6 F.3d at 153 n. 2; Wright, Miller & Cooper, *Federal Practice & Procedure*, Jurisdiction 3d § 3949.4. Moreover, Macy's had notice of plaintiffs' intent to appeal the discovery order since plaintiffs sought review of the entire judgment and argued the merits of the discovery order in their opening appellate brief. *See Polonski*, 137 F.3d at 144 (stating that "the appellate proceedings clearly manifest an intent to appeal"); *see also Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 974 (4th Cir.1997) (noting that arguing merits of issue in opening appellate brief puts appellee on notice as to that issue). And finally, we discern no prejudice to Macy's. Accordingly, we have jurisdiction.

[16] B. Having found that we have jurisdiction to review this issue, we must next determine whether the District Court abused its discretion in limiting discovery to "what promises, if any, were made by defendant prior to and at the final audition ... in New York City that the person selected at that audition would appear in the role as Annie." App. at 38a. Plaintiffs contend that the District Court abused its discretion by unduly limiting discovery to preclude them from obtaining information relevant to their fraudulent misrepresentation claims. We review the District Court's discovery order for abuse of discretion. *See Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir.1986).

[17] The Federal Rules of Civil Procedure provide, in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). It is well recognized that the federal rules allow broad and liberal discovery. *See*

In re Madden, 151 F.3d 125, 128 (3d Cir.1998) ("Pretrial *778 discovery is ...'accorded a broad and liberal treatment.'") (citing *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)); *see also* Wright, Miller & Marcus, *Federal Practice & Procedure*, Civil 2d § 2007 ("The rule does allow broad scope to discovery and this has been well recognized by the courts.").

[18][19] To succeed on a claim for fraudulent misrepresentation under Pennsylvania law, plaintiffs must establish the following elements: (1) a misrepresentation, (2) a fraudulent utterance, (3) an intention to induce action on the part of the recipient, (4) a justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as a proximate result. *See Banks v. Jerome Taylor & Assocs.*, 700 A.2d 1329, 1333 (Pa.Super.1997). To prove these elements, plaintiffs must demonstrate that Macy's fraudulently misrepresented that the successful participant would perform as "Annie" on Broadway, that it did so with the intent to induce participation in the Search, and that Joanna relied to her detriment upon the misrepresentation.

[20] Plaintiffs seek production of the following: (1) Macy's communications with, and relationship to, the producers regarding the terms of the contract that the producers intended to offer the successful contestant and (2) the pecuniary benefit Macy's received as a result of the Search. *See* Appellants' Br. at 12, 24. This information could shed light on Macy's knowledge that it could not offer a Broadway opening and its motives for failing to limit the offer accordingly. Thus, we conclude that the discovery sought here is directly relevant to the subject matter of this dispute.

We also find it noteworthy that Macy's submitted its contract with the producers in support of summary judgment. As previously noted, the federal rules permit discovery of, among other things, "any matter, not privileged, which is relevant to the *subject matter* involved in the pending action, whether it relates to the claim or defense of the party seeking discovery *or to the claim or defense of any other party* ...." Fed.R.Civ.P. 26(b)(1) (emphasis added).

[21] Macy's asserts that the only relevant representations are "those to which plaintiffs were ... privy" and "upon which plaintiffs could have reasonably relied." Appellee's Br. at 34. This "what they don't know can't hurt them" argument is unconvincing. The fact that plaintiffs were not privy to the information that Macy's possessed when Joanna relied on its representations and participated in the Search forms the very basis of plaintiffs' fraudulent misrepresentation claims.[FN9]

> FN9. Plaintiffs also argue that the District Court erred in limiting the number of depositions. In light of our disposition here, the District Court on remand can reconsider whether additional depositions are necessary to effectuate plaintiffs' discovery needs with respect to their fraudulent misrepresentation claims. Only if one of the factors in Federal Rules of Civil Procedure 26(b)(2) is present should the Court limit the number of depositions. *See*Fed.R.Civ.P. 26(b)(2) (setting forth situations in which courts may limit the number of depositions).

Accordingly, we conclude that the District Court erred in limiting discovery.

IV.

For the reasons discussed above, we reverse the grant of summary judgment on all claims and remand for further proceedings in accordance with this opinion. We also reverse and remand for plaintiffs to conduct discovery consistent with this opinion.

WILLIAM STAFFORD, Senior District Judge, dissenting.

I cannot agree that the district judge erred in granting summary judgment in favor of Macy's. Macy's offered Joanna Pacitti the opportunity of starring in the 20th Anniversary Broadway production *779 and national tour of "Annie." Joanna Pacitti received that opportunity. She auditioned for the part of Annie; she was selected by the show's producers to play the part of Annie; and she, in fact, played the part of Annie, performing in over one hundred performances in six cities during the production's national tour. She did not, however, appear on Broadway because the producers decided to replace her before the Broadway opening.

The district court concluded, and I agree, that Joanna Pacitti received the benefit of her bargain with

Macy's. Because I do not believe that her contract with Macy's was subject to the interpretation urged by Plaintiffs, I must respectfully dissent.

C.A.3 (Pa.),1999.
Pacitti v. Macy's
193 F.3d 766, 44 Fed.R.Serv.3d 1240

END OF DOCUMENT

EXHIBIT 2

Cipollone v. Liggett Group, Inc.
C.A.3 (N.J.),1986.

United States Court of Appeals,Third Circuit.
Antonio CIPOLLONE, individually and as the Executor of the Estate of Rose D. Cipollone, Plaintiff-Respondent,
v.
LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris Incorporated, a Virginia Corporation; and Loew's Theatres, Inc., a New York Corporation, Defendants-Petitioners.
LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris Incorporated, a Virginia Corporation; and Loew's Theatres, Inc., a New York Corporation, Petitioners,
v.
Honorable H. Lee SAROKIN, United States District Judge for the District of New Jersey, Nominal Respondent.
Susan HAINES, as Administratrix Ad Prosequendum and Executrix of the Estate of Peter F. Rossi, Plaintiff-Respondent,
v.
LIGGETT GROUP, INC., a Delaware Corporation; Loew's Theatres, Inc., a New York Corporation; R.J. Reynolds Tobacco Co., a New Jersey Corporation; Philip Morris Incorporated, a Virginia Corporation; and the Tobacco Institute, Defendants-Petitioners.
LIGGETT GROUP, INC., a Delaware Corporation; Loew's Theatres, Inc., a New York Corporation; R.J. Reynolds Tobacco Co., a New Jersey Corporation; Philip Morris Incorporated, a Virginia Corporation; and Loew's Theatres, Inc., a New York Corporation, Petitioners,
v.
Honorable H. Lee SAROKIN, United States District Judge for the District of New Jersey, Nominal Respondent.
Antonio CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,
v.
LIGGETT GROUP, INC., a Delaware Corporation; Philip Morris Incorporated, a Virginia Corporation; and Loews Corporation, a Delaware Corporation, and Loew's Theatres, Inc., a New York Corporation.
Appeal of LIGGETT GROUP, INC., Philip Morris Incorporated, and Loew's Theatres, Inc.
Susan HAINES, as Administratrix Ad Prosequendum and Executrix of the Estate of Peter F. Rossi
v.
LIGGETT GROUP, INC., a Delaware Corporation; Loew's Theatres, Inc., a New York Corporation, R.J. Reynolds Tobacco Co., a New Jersey Corporation; Philip Morris Incorporated, a Virginia Corporation; and the Tobacco Institute.
Appeal of LIGGETT GROUP, INC., Loew's Theatres, Inc., R.J. Reynolds Tobacco Co., Philip Morris Incorporated, and the Tobacco Institute.
Nos. 85-3423, 85-3424, 85-5529 and 85-5530.

Argued Sept. 26, 1985.
Decided March 12, 1986.

Cigarettes smokers or their personal representatives brought products liability suits against tobacco companies. The United States District Court for the District of New Jersey, H. Lee Sarokin, J., amended a protective order obtained by the tobacco companies, and the plaintiffs appealed and also petitioned for mandamus. The Court of Appeals, Becker, Circuit Judge, held that District Court committed clear errors of law in applying a least-restrictive-means test rather than a good-cause standard and in reviewing magistrate's order under an incorrect plenary review standard; thus, those errors warranted exercise of Court of Appeals' mandamus jurisdiction and reversal of District Court's order and remand for reconsideration of good cause.

Writ granted.

West Headnotes

[1] **Federal Courts 170B ⚿594**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk594 k. Discovery and Production of Documents; Depositions. Most Cited

Cases
Discovery orders, being interlocutory, are not normally appealable.

[2] **Federal Courts 170B 572.1**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk572.1 k. In General. Most Cited Cases
(Formerly 170Bk572)
To be reviewable pursuant to the collateral-order doctrine, a nonfinal order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from final judgment.

[3] **Federal Courts 170B 574**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases
Order amending a protective order in a products liability action was not appealable under the collateral-order doctrine since the order touched on the merits of the underlying action.

[4] **Mandamus 250 57(1)**

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k57 Proceedings for Review
250k57(1) k. In General. Most Cited Cases
District court, in amending protective order obtained by tobacco company's in products liability actions, committed clear errors of law in applying a least-restrictive-means test rather than a good-cause standard and in reviewing magistrate's order under an incorrect plenary review standard; thus, those errors warranted exercise of Court of Appeals' mandamus jurisdiction and reversal of district court's order and remand for reconsideration of good cause. Fed.Rules Civ.Proc. Rule 26(c), 28 U.S.C.A.; 28 U.S.C.A. §§ 636(b)(1)(A), 1651.

[5] **Mandamus 250 28**

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k28 k. Matters of Discretion. Most Cited Cases
Mandamus is not available for abuse of discretion; rather, court exercises mandamus jurisdiction only if it finds that district court committed a clear error of law. 28 U.S.C.A. § 1651.

[6] **1271.5**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271.5 k. Protective Orders. Most Cited Cases
(Formerly 170Ak1271)
Burden of persuasion is on the party seeking a protective order; to overcome the presumption, party seeking the protective order must show good cause by demonstrating a particular need for protection; broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the test. Fed.Rules Civ.Proc. Rule 26(c), 28 U.S.C.A.

[7] **1271.5**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271.5 k. Protective Orders. Most Cited Cases
(Formerly 170Ak1271)
An applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. Fed.Rules Civ.Proc. Rule 26(c), 28 U.S.C.A.

[8] Federal Civil Procedure 170A ⚷1615.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1615 Motion and Proceedings Thereon
170Ak1615.1 k. In General. Most Cited Cases
(Formerly 170Ak1615)
Burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on party seeking the protective order; however, party seeking protective order is not necessarily required to demonstrate to the court in the first instance on a document-by-document basis that each item should be protected. Fed.Rules Civ.Proc. Rule 26(c), 28 U.S.C.A.

*1110 Donald C. Cohn (Argued), Alan S. Naar, Paul A. Rowe, Greenbaum, Rowe, Smith, Ravin, Davis & Bergsteind, Newark, N.J., for appellant-petitioner Liggett Group, Inc.
Joel C. Balsam, Sills, Beck, Cummis, Zukerman, Radin, Tischman & Epstein, Newark, N.J., for appellant-petitioner Loew's Theatres, Inc.
Murray H. Bring (Argued), Arnold & Porter, Washington, D.C., Raymond F. Drozdowski, Brown, Connery, Kulp, Wille, Purnell & Greene, Camden, N.J., for appellant-petitioner Philip Morris, Inc.
Peter N. Perretti, Jr., Riker, Danzig, Scherer, Hyland & Perretti, Morristown, N.J., for appellant-petitioner R.J. Reynolds Tobacco Co.
John T. Dolan, Crummy, Del Deo, Dolan, Griffinger & Vecchione, Newark, N.J., for appellant-petitioner The Tobacco Institute, Inc.
Marc Z. Edell (Argued), Lisa Murtha, Porzio, Bromberg & Newman, Morristown, N.J., for appellees-plaintiffs Antonio Cipollone and Susan Haines.

Before HIGGINBOTHAM, BECKER and STAPLETON, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.
These appeals require us to apply the principles and case law pertaining to Fed.R.Civ.P. 26(c) to a claim that certain materials obtained in civil discovery but alleged by the producing party to be confidential may be disclosed by the discovering party to the public. We must also consider whether we have appellate jurisdiction over the district court's interlocutory order permitting disclosure of the materials.

The appeal arises from two of the several cases nationwide in which cigarette smokers or their personal representatives have instituted product liability suits against tobacco companies. In both cases, the parties had already engaged in extensive discovery, including production of a very large number of documents by defendants, when the defendants sought protective orders that would prevent the dissemination, either to the public or to counsel in other similar cases, of any documents they had produced or would produce during discovery.[FN1]
A federal magistrate entered identical protective orders in both cases along the lines requested by the defendants.

> FN1. Although the record is unclear on the point, it appears from representations made at oral argument that confidentiality was maintained during the initial phase of the litigation by tacit mutual understanding and that it was only when plaintiffs' counsel evinced an intention to use the material beyond the confines of the litigation that the protective order phase of the litigation began.

On appeal from the magistrate's orders, the district court substantially revised them. The court altered the procedure that the magistrate's orders had established for deciding disputed claims of confidentiality, and restricted the orders' scope so that release of the documents to the press and public would have followed almost as of course but for this appeal. The *1111 revised orders also permitted the documents to be used in other cases in which plaintiffs' counsel was the counsel of record.

The defendants thereupon appealed to this Court and petitioned for mandamus, asserting that the revised orders violated Fed.R.Civ.P. 26(c) and reflected a skewed reading of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). The defendants also moved for an expedited appeal and a stay of the district court's orders, as well as

reinstatement of the magistrate's orders pending appeal. We granted those motions. The plaintiffs moved to dismiss the appeals for want of appellate jurisdiction, and also moved to dismiss the petition for mandamus.

We hold that: (1) we do not have jurisdiction to review the order pursuant to the collateral order doctrine as enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); (2) we do have mandamus jurisdiction to review the order pursuant to 28 U.S.C. § 1651 (1982); (3) because the district court's reading of *Seattle Times* constituted a clear error of law, the ruling on the defendants' motion for protective orders was incorrect; and (4) the district court also clearly erred in relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) to exercise plenary review of the magistrate's protective order, for the court was bound to apply a "clearly erroneous" standard. We therefore grant the writ of mandamus. To assist the district court in future proceedings, we discuss two additional points relevant to this case: the definition of "good cause," and the administration of protective order proceedings.

I. PROCEDURAL HISTORY

A. *The Institution of the Suits*

Rose Cipollone and her husband Antonio filed a complaint against Liggett Group, Inc., Phillip Morris, Inc., and Loew's Theaters, Inc., all manufacturers of cigarettes,[FN2] in the district court for the District of New Jersey on August 1, 1983. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (1982). The complaint alleged that defendants manufactured or sold cigarettes and that Rose Cipollone had smoked defendants' cigarettes for almost forty years. As a result of her smoking, the complaint alleged, she acquired bronchogenic carcinoma and other personal injuries; it further alleged that she had experienced severe pain and suffering and that her illness had caused her-and would continue to cause her-great expense. Plaintiffs sought compensation for Rose Cipollone's injuries, suing under theories of negligence and strict liability. Central to plaintiffs' case was their allegation that defendants had withheld scientific evidence from the public and had misrepresented the effects upon health of smoking cigarettes. They also sought compensation for Antonio Cipollone's loss of consortium.

> FN2. Liggett and Phillip Morris are well-known tobacco companies. Loews, originally an entertainment company but now a conglomerate, manufactures True Cigarettes.

Shortly thereafter, Susan Haines as administratrix ad prosequendum and executrix of the Estate of Peter F. Rossi brought suit in the same court against the same three defendants as well as R.J. Reynolds Tobacco Co. and the Tobacco Institute, Inc. Haines was represented by the same attorney who represented the Cipollones. Jurisdiction was based on diversity, and once again the complaint alleged tortious conduct sounding in strict liability and negligence. The complaint also included an allegation of misrepresentation. The plaintiff sought compensation for the decedent's pain and suffering and for his death, which she alleged was the result of his smoking defendants' cigarettes.

B. *The Initial Protective Order*

The district court ordered discovery in both cases under the supervision of a federal magistrate. 28 U.S.C. § 636(b)(1)(A) (1982). Discovery proceeded until March *1112 1985, and a large number of documents were produced by the defendants for inspection pursuant to Fed.R.Civ.P. 34. On that date, the defendants moved for an "umbrella" protective order. The defendants argued that such an order would facilitate the discovery process by reducing the number of occasions for lawyers' conferences and discussions about the confidentiality of particular documents. Defendants also argued that they had good cause for the protective order under Fed.R.Civ.P. 26(c) [FN3] and that the closely analogous *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), permitted a protective order in this case. Plaintiffs objected to the defendants' proposal, countering that the defendants' real purpose was to make it impossible for plaintiffs in other suits against the cigarette companies to share information gathered from the defendants. The defendants' strategy, said plaintiffs, was to raise the expense of litigation for future plaintiffs, thus making the cost of suits prohibitive.

FN3. The rule reads:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court....

After hearing the matter, the magistrate found for defendants. On March 25, 1985, he entered identical protective orders in both cases. The crucial aspects of the protective orders may be summarized as follows: (a) "all information" produced in discovery, presumably confidential and nonconfidential alike, could be used only for the instant cases and not for other cases or other purposes; (b) the defendants had the responsibility in the first instance of deciding in good faith which of their documents were confidential and marking them accordingly; (c) information marked confidential could be examined as a matter of course by plaintiffs' lawyer, his associates, and experts retained by plaintiffs or their lawyer for the cases; (d) if plaintiffs wished to disclose the information to anyone else, they had to inform defendants' counsel, who then had opportunity to apply to the court to prevent that disclosure; and (e) all documents and copies thereof had to be destroyed or returned at the conclusion of the litigation.[FN4]

FN4. The relevant portions of the Magistrate's protective order read as follows:

> 2. All information produced or exchanged in the course of this civil action or any appeal arising therefrom (the "litigation") shall be used solely for the purpose of this case.
>
> 3. "Confidential information" as used herein means any information which is designated as "confidential".... Information shall be designated as confidential only upon a good-faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.
>
> 6. Confidential information may be inspected only by the following persons:
>
> (a) Counsel of record for plaintiff and defendants [and other lawyers employed by plaintiff and defendants for this case];
>
> (b) Experts retained by or on behalf of any party....
>
> 10. Prior to the disclosure of any confidential information to any person, other than outside counsel and their employees or medical experts, the party seeking disclosure shall advise counsel and the Court, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose.... Within twenty (20) days after such advice, counsel to whom notice is given may ... give written notice to adverse counsel of an application to this Court for an order

> prohibiting the proposed disclosure. No such disclosure shall take place until the Court has acted upon such application.
>
> 13. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties shall either return all documents produced, if so requested by the producing party, or shall destroy such documents.
>
> App. at 52-56, 59-63.

*1113 C. *Plaintiffs' Appeal to the District Court*

Plaintiffs appealed the protective order to the district court, arguing that the order violated plaintiffs' first amendment rights to disseminate the information that they had received through discovery. Plaintiffs relied on *Seattle Times, supra,* arguing that the defendants and the magistrate had misconstrued the Supreme Court's holding in that case. They also argued that the defendants had failed to demonstrate good cause as required for a protective order by Fed.R.Civ.P. 26(c).

The district court filed a lengthy opinion, covering its scope of review of the magistrate's decision, the meaning and relevance of *Seattle Times,* the notion of "good cause" in Fed.R.Civ.P. 26(c), and the proper scope of the protective order. Disposition of the appeal requires that we describe each part of the district court's opinion in some detail.

1. *The District Court's Scope of Review of the Magistrate's Protective Order*

Although 28 U.S.C. § 636(b)(1)(A) states that a magistrate's order is not to be reconsidered unless it is "clearly erroneous or contrary to law," [FN5] the district court ruled that its standard of review was plenary, relying on *Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), which held that an appellate court has plenary review over the finding of actual malice in libel cases. *See* Dist.Ct.Op. at A17-A18.[FN6]

> FN5. *See also* Fed.R.Civ.P. 72(a); General Rule 40 D(4) of the U.S. Dist. Ct. for the Dist. of N.J. *See generally United States v. Raddatz,* 447 U.S. 667, 673, 100 S.Ct. 2406, 2411, 65 L.Ed.2d 424 (1980); *Merritt v. International Brotherhood of Boilermakers,* 649 F.2d 1013, 1016-17 (5th Cir.1981).
>
> FN6. 28 U.S.C. § 636(b)(1)(B) also allows a district judge to designate a magistrate to submit to the court a report containing proposed findings of fact and recommendations for disposition. The court reviews *de novo* any portions of the report to which parties object. *Id.* The parties in this case agree that the magistrate was acting pursuant to § 636(b)(1)(A).

2. *The District Court's Analysis of* Seattle Times

The district court next engaged in a lengthy first amendment analysis of protective orders in discovery. It reviewed the conflicting approaches of the circuit courts prior to *Seattle Times* [FN7] and then observed that *Seattle Times* had resolved the issue. The court quoted what it believed to be the relevant analysis from that case:

> FN7. One court required a showing of serious harm in the absence of a protective order and a demonstration that the proposed protective order would be the least restrictive means possible for avoiding the harm. *See In re Halkin,* 598 F.2d 176, 191-96 (D.C.Cir.1979). Another court held that the first amendment did not affect a court's authority to issue a protective order. *See International Products Corp. v. Koons,* 325 F.2d 403, 407-08 (2d Cir.1963). A third court took a middle course, applying a balancing test that includes the magnitude of the threatened harm in the absence of a protective order, the breadth of the order, and the order's probable effectiveness. *See In re San Juan Star Co.,* 662 F.2d 108 (1st Cir.1981).

The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider

whether the "practice in question [furthers] an important or substantial governmental interest" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary to the *1114 protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974).
104 S.Ct. at 2207 (quoted in Dist.Ct.Op. at A21-A22).

The district court believed the passage established that, when a case involves matters of substantial public interest, a protective order implicates first amendment concerns and some constitutional analysis is required. Dist.Ct.Op. at A24-A25. The district court went further, explicitly analogizing the case before it to *Seattle Times* and holding that the same constitutional inquiry was appropriate in both cases: "It therefore remained there, and remains here, to decide only whether the protective orders at issue limited first amendment freedoms more than necessary or essential to protect the governmental interests furthered by Rule 26(c)." Dist.Ct.Op. at A22.

The court did note one point of confusion about *Seattle Times* that is relevant to our discussion below. Despite the Supreme Court's apparent endorsement in the above passage of a least restrictive means analysis, its *holding* subsumes a different analysis entirely. The district court quoted that holding in full:

We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

104 S.Ct. at 2209-10 (footnote omitted) (quoted in Dist.Ct.Op. at A22-A23). As the district court noted, this explicit holding appears to exclude any first amendment analysis from the decision about whether a court should issue a protective order; that is, it implies that "if a protective order passes muster under Rule 26(c), it must, of necessity, be constitutional." Dist.Ct.Op. at A24. However, the analytical passage quoted earlier, *see supra* pp. 1113-14, implies that a court must apply a least restrictive alternative test to all proposed protective orders. Although it noted this apparent contradiction, the district court did not resolve it explicitly, apparently assuming that *Seattle Times* imposed a least restrictive alternative test and that the test had to be read into the holding. *See* Dist.Ct.Op. at 24-25; *see generally infra* part IV (discussing the district court's first amendment analysis).[FN8]

> FN8. The district court may have been motivated to make this assumption by its perception that a protective order would favor the economically powerful defendants and prevent the public and the relatively impecunious plaintiffs from gaining access to material in which there was an enormous public interest. *See id.* at A11 ("The court cannot ignore the might and power of the tobacco industry and its ability to resist the individual claims asserted against it and its individual members.")

3. *The District Court's Findings on Good Cause*

The district court noted that the party seeking the protective order bore the burden of proving that there was good cause for such an order. It also observed that a protective order could issue only upon a showing that disclosure would result in "clearly defined and serious injury." Dist.Ct.Op. at A26. Although early in its opinion the court suggested that there could be good cause only for revelation of technical information that might hurt one of the defendants' competitive positions,[FN9] the court later made it clear, as the caselaw has established, that lesser concerns, including "embarrassment," might constitute good cause for a protective order. Dist.Ct.Op. at A32 n. 8.[FN10]

> FN9. The court wrote that
>
> > [d]efendants [are] entitled to protection from the disclosure of matters which are truly secret, where disclosure thereof will affect the operation of their business, but not their potential liability. Formulae, marketing strategy, and other matters whose disclosure would affect defendants with their respective competitors or in conjunction with the day-to-day operation of their business are entitled to protection.

A10-A11.

> FN10. Rule 26(c) protects parties from a broad range of troubles: "annoyance, embarrassment, oppression, or undue burden or expense." Consistent with the spirit of the Rule, courts have held that a showing of harm to nonbusiness interests may constitute a good cause. *See, e.g.*, *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.) (government's interest in conducting thorough and confidential investigations is ground for a protective order), *cert. denied*, 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982) *Galella v. Onassis*, 487 F.2d 986 (2d Cir.1973) (protection of public figure from physical and emotional harassment). The Supreme Court has expressly stated that Rule 26(c) protects privacy interests. *Seattle Times*, *supra*, 104 S.Ct. at 2208 n. 21.

***1115** After discussing these broad legal issues, the court turned to the particular facts before it, and found that neither the magistrate's opinion nor the submissions of the defendants sustained the burden of justifying the protective order. It found that "the reasons asserted are quite conclusory," *id.* at A28, and that defendants' suggestion that the magistrate's protective order would 'streamline the litigation' was not sufficient to carry the evidentiary burden. *Id.*

4. *The Scope of Confidentiality*

As noted above, the magistrate's order applied to *all* information produced during discovery. *See supra* p. 11; Magistrate's Order ¶ 2, *supra* note 4. The district court criticized this approach, stating that nonconfidential material was, by definition, information for which no Rule 26(c) good cause had been shown and that therefore no protective order should protect such material. Dist.Ct.Op. at A29.

The district court also criticized the portion of the magistrate's order that had prohibited the use in any other case of the materials produced in this case's discovery. The district court said that the prohibition "undermine[d] the purpose of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action.' " Dist.Ct.Op. at A34 (quoting Fed.R.Civ.P. 1) (footnote omitted). Additionally, the court noted that prohibiting the use of materials from one case in other cases would burden both the plaintiffs and the defendant:

> There may be some claimants who do not have the resources ... to pursue the thorough investigation which these cases require. To require that each and every plaintiff go through the identical, lone and expensive process would be ludicrous. Even from the point of view of the defendants (though they resist), it would seem that they would benefit by avoiding repetition of the same discovery in each and every case."

Id. at A11.

5. *The District Court's Amendment to the Protective Order*

The district court amended the magistrate's protective order in light of its conclusions as outlined above. The court's amendments were as follows: (a) whereas the magistrate's protective order had limited the use of all materials produced in discovery, the amended protective order would apply only to confidential materials and would not restrict the use of nonconfidential materials; (b) rather than making defendants' good faith the only limitation on their freedom to designate documents confidential, and forcing the plaintiffs to challenge the designation subject thereafter to rulings by the Court, the amended order required the defendants to demonstrate in a document-by-document showing to the court that each document they believed to be confidential was so in fact; the advantage of this system, the court explained, was that it "does not allow misuse of the confidentiality designation and places the burden of proving such confidentiality squarely upon defendants, as required by Rule 26(c) and the first amendment," *id.* at A29-A30; (c) although the court agreed that confidential information could not be released to the public, its order differed from the magistrate's in that the court's order allowed plaintiffs' counsel to use any and all confidential materials in cases in which he was a participant, *id.* at A32; and (d) the amended order eliminated entirely the provision requiring counsel to return or destroy all documents produced in discovery; this was done virtually without discussion, because defendants had not ***1116** opposed plaintiffs'

motion to eliminate the provision.[FN11]

FN11. The relevant portions of the district court's protective order read as follows (all parts of the district court's order that were not part of the magistrate's order are italicized; all parts of the magistrate's order that the district court omitted are in square brackets; unchanged portions are unmarked):

> 2. All "*confidential* " information produced *by defendants* [or exchanged] in the course of this civil action or any appeal arising therefrom (the "ligitation") *may be used in all cases in which plaintiffs' counsel in this action are counsel of record* [shall be used for the purpose of this case].
>
> 3. "Confidential information" as used herein means any *document* [information] which is *found by the court or agreed by the parties to be* [designated] "confidential".... Information shall be designated as "*claimed* confidential" only upon the good faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto. *If defendants claim that a particular document is confidential, it shall be the defendants' burden to bring a motion before the court to determine whether the document in question is a confidential document under the Federal Rules of Civil Procedure and the precedents thereto. Failure of defendants to bring such a motion within ten days of advising plaintiffs' counsel of any claim of confidentiality shall constitute a waiver of any claim of confidentiality as to the document in question and permit removal of the claim of confidentiality. Should the court determine that the defendants have misused the "claimed confidential" designation, it will consider awards of costs including counsel fees incurred as a result of the misuse of said designation.*
>
> 5. *Confidential information may be inspected only by the following persons:*
>
> (a) *Counsel of record for the plaintiff and defendants in this or other* litigation, any lawyers specifically employed by them in connection with this *or other* litigation and any employee of such counsel assisting with this *or other* litigation:
>
> (b) Experts retained by or on behalf of any party to provide assistance or testimony in connection with this litigation.
>
> 9. Prior to the disclosure of any confidential information to any person, other than counsel and their employees or experts, the party seeking disclosure shall advise the court and counsel, in writing, of the name, address and occupation of the person to whom counsel proposes to disclose said confidential information. Within twenty days after such advice, counsel to whom notice is given may ... give written notice to adverse counsel on an application to this court for an order prohibiting such disclosure. No such disclosure shall take place until the court has acted on such application.
>
> [13. Within forty-five (45) days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy such documents.]

The defendants immediately moved the district court for a stay of its own protective order. The district court granted a stay conditioned on defendants' instituting proceedings in the court of appeals, which they did promptly. We granted a further stay pending disposition of the appeal, having been informed that appellees had scheduled a press conference for the morning following expiration of the stay and that they would, at that time, release to the public all the documents obtained in discovery.

II. *COLLATERAL APPEALABILITY*

[1] Discovery orders, being interlocutory, are not

normally appealable. *See* Borden Co. v. Sylk, 410 F.2d 843, 845 (3d Cir.1969); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2006 at 29 (1970 & Supp.1985). The first issue before us, therefore, is whether we have appellate jurisdiction. The defendants make two arguments in favor of appellate jurisdiction. First, they assert that the district court's protective order is a collateral order appealable under the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the alternative, they argue that this court should exercise its statutory power of mandamus, 28 U.S.C. § 1651 (1982), to review the order. We consider collateral appealability here and the mandamus argument in part III *infra*.[FN12]

> FN12. Although we took this appeal before any documents had been challenged under the district court's protective order, the appeal is ripe. It is clear that we are not deciding mere hypothetical questions that we might avoid by refusing jurisdiction at this time, for the parties have indicated to us that they differ sharply over the propriety of disseminating several documents. It is also clear that, as the district court's alleged errors are purely legal, *see infra* parts IV and V, the issues before us are sufficiently concrete to allow for judicial determination and will not be better defined by waiting. Thus, nothing would be gained by waiting for a particular dispute to exercise appellate jurisdiction. Moreover, there is danger that, if we did not take this appeal, some documents would be released before we had the opportunity for review. That potential harm, once done, could not be undone. *See infra* III.A. Thus, this may be the only opportunity for meaningful appellate review.

*1117 Title 28 U.S.C. § 1291 (1982) provides that courts of appeals may review only "final" decisions of the district courts. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), however, the Supreme Court established a narrow exception to the rule of finality. *Cohen* held that a prejudgment order of a district court can be reviewed if it falls within

> that small class [of prejudgment orders] which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546, 69 S.Ct. at 1225. *See also Mitchell v. Forsyth*, 472 U.S. 511, ----, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985); *Richardson-Merrell, Inc. v. Koller*, --- U.S. ----, ----, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985).

[2] *Cohen's* progeny have established three requirements for the review of non-final orders: to be reviewed the order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). We have made clear that each of the three requirements must be met before appellate review is permitted. *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 537 (3d Cir.1985); *Metex Corp. v. ACS Industries, Inc.*, 748 F.2d 150, 153 (3d Cir.1984); *Lusardi v. Xerox Corp.*, 747 F.2d 174, 177 (3d Cir.1984); *Gross v. G.D. Searle & Co.*, 738 F.2d 600, 602 (3d Cir.1984). This approach furthers the important goal of avoiding piecemeal litigation.

[3] The second prong is not met here because defendants' claim touches on the merits of the underlying action. The underlying action raises issues concerning whether and when the defendants knew of the health hazards associated with smoking cigarettes and what steps the defendants allegedly took to mislead the public about those hazards. Defendants contend that the materials should not be disseminated because they would present a distorted and unfair picture about what the defendants knew about the effects of cigarettes on health. Our evaluation of defendants' argument would take us into the merits of the underlying action because we would have to make a judgment about what defendants knew and what steps they may have taken to mislead the public-precisely the issues at the heart of the underlying action. *See supra* pp. 1111-12.[FN13] Because the second prong is not satisfied, we do not have jurisdiction under the *Cohen* doctrine.

> FN13. This case is thus similar to *State of*

New York v. United States Metal Refining Co., 771 F.2d 796 (3d Cir.1985), in which a panel of this court held that it did not have *Cohen* jurisdiction to review an order prohibiting dissemination of a report prepared by the State of New York about the pollution practices of United States Metal Refining Company (USMR). USMR's argument against dissemination was that the report was biased and inaccurate. We held that because an evaluation of that argument would involve an inquiry into the actual environmental practices of USMR, a decision on the protective order would necessarily involve it with the merits of the underlying action. *Id.* at 800.

III. MANDAMUS

[4] The All Writs Act, 28 U.S.C. § 1651(a) (1982), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." Although writs of mandamus*1118 are extraordinary devices and we have read § 1651(a) narrowly, mandamus has been held to be appropriate when a failure to issue the writ would lead to the disclosure of confidential materials. *See, e.g., Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir.1984); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.1979); *In re Halkin*, 598 F.2d 176 (D.C.Cir.1979). In *Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir.1985), we held that a writ of mandamus should issue when (A) the party seeking the writ has " 'no other adequate means to attain the relief he desires,' " (quoting *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980)), and (B) the court below has committed a clear error of law. We consider these requisites in turn.

A. *Other Avenues of Redress*

No other paths to appellate review are available to defendants. First, if defendants are required to wait until the final order of the litigation, their appeal on this issue would be valueless. The harms defendants seek to avoid are embarrassment and prejudice in the community at large. Defendants thus require injunctive relief, for compensatory damages would be virtually impossible to assign. Unless the district court's order is vacated, the materials will be released; thereafter, it will be impossible, practically speaking, to rectify the harm. *See C & C Products, Inc. v. Messick*, 700 F.2d 635, 637-38 (11th Cir.1983) (appeal from district court's modification of a protective order dismissed as moot because the materials had already been released and "no order from this court can undo that situation."). Second, as we have already seen, *supra* II., the district court's order is not appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*[FN14]

FN14. Neither can defendants obtain immediate appellate review by certification pursuant to 28 U.S.C. § 1292(b) (1982), for the district court made no such certification nor could it have, since that provision limits review by certification to orders "an immediate appeal from [which] may materially advance the ultimate termination of the litigation." The protective order at issue here, although not completely separate from the substantive issues of the case, *supra* p. 1118, is substantially collateral to them and is certainly not of the pivotal nature required for certification. *Cf. Evanson v. Union Oil Co. of California*, 619 F.2d 72, 74 (Em.App.1980); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2006 at 31 (1970 & Supp.1985) ("Ordinarily it is difficult to believe that a discovery order will present a controlling question of law or that an immediate appeal will materially advance the termination of the litigation.").

B. *Clear Error of Law*

[5] Mandamus is not available for abuse of discretion. Rather, we exercise mandamus jurisdiction only if we find that the district court committed a clear error of law. *Sporck*, 759 F.2d at 314. This requirement is satisfied because the district court made two clear errors of law. First, it misread *Seattle Times v. Rhinehart* and imposed under Fed.R.Civ.P. 26(c) a more stringent good cause standard than was necessary or appropriate. Second, on account of its misreading of *Seattle Times*, it exercised plenary review over the magistrate's order when the "clearly erroneous" standard was required.

As both of these errors were germane to its decision, *see* discussion *infra,* they are independent grounds for reversal. We take these matters up in turn.

IV. THE DISTRICT COURT'S MISREADING OF SEATTLE TIMES

As we have noted, the district court identified an ambiguity in the *Seattle Times* opinion: it was unclear whether *Seattle Times* mandated a Rule 26(c) analysis without regard to the first amendment, or whether it required an analysis that included a strict least restrictive means test. *See* discussion *supra* pp. 1114-15. *See also* Post, *The Management of Speech: Discretion and Right,* 1984 Sup.Ct.Rev. 169, 181-82 (noting the same point). This ambiguity may be significant because the good cause analysis, although by no means toothless, *see infra* part VI.A. is significantly less stringent than the least restrictive ***1119** means test. The district court chose the latter alternative without explanation and analyzed the case in first amendment terms, applying the least restrictive means test. *See* Dist.Ct.Op. at A22. While we recognize the ambiguity in *Seattle Times,* we believe for several reasons that the district court misinterpreted *Seattle Times* and that *Seattle Times* prohibits a court considering a protective order from concerning itself with first amendment considerations.

We recently had opportunity in a case very similar to this one, *State of New York v. United States Metal Refining Co.,* 771 F.2d 796 (3d Cir.1985) to interpret *Seattle Times.* We found there that *Seattle Times* confirmed our previous suspicion that protective orders in civil discovery did not require first amendment analysis:

> This court has noted that an order prohibiting the disclosure of information obtained under the rules of discovery probably does not run afoul of the first amendment. *Rodgers v. United States Steel Corp.,* 536 F.2d 1001, 1006 (3d Cir.1976).... The Supreme Court confirmed our point of view in the *Seattle Times* case. 104 S.Ct. at 2009-10.

New York v. United States Metal Refining Co., 771 F.2d at 802. Thus, *United States Metal Refining Co.* is clear precedent for the interpretation eschewed by the district court.[FN15]

> FN15. We note that *United States Metal Refining Co.* was decided about two months after the district court's order in this case, and therefore the district court did not have the benefit of it at the time of its decision.

This holding would appear to end our inquiry. However, because the district court's interpretation of *Seattle Times* raises questions not considered in *United States Metal Refining Co.,* it is appropriate and useful to review the *Seattle Times* opinion in the light of these questions. That review confirms the soundness of *United States Metal Refining Co.*'s reading of *Seattle Times.* In the first place, the Supreme Court's holding in *Seattle Times* was peremptory: "a protective order ... entered on a showing of good cause as required by Rule 26(c)... does not offend the First Amendment." 104 S.Ct. at 2209-10. This statement leaves no room for lower courts to consider first amendment factors in fashioning or reviewing Rule 26(c) orders. The unequivocal nature of the Court's holding supersedes any ambiguity in its earlier discussion.

Second, the rest of the Supreme Court's opinion, which emphasized that the discovery process was not a forum traditionally open to the public, 104 S.Ct. at 2208, and that the process was "a matter of legislative grace," *id.* at 2207, to which no first amendment rights attached, is consistent with the position that the first amendment is simply irrelevant to protective orders in civil discovery; it does not comport with the district court's insistence on a less restrictive means test in protective order determinations. Although the Supreme Court's dictum about less restrictive means analysis is to the contrary, *see*104 S.Ct. at 2207, this dictum is insufficient to overcome the weight of the Court's holding and the evident direction of the Court's reasoning.

Finally, we note that the overwhelming number of courts that have considered this issue have reached the same conclusion. *See Worrell Newspapers of Indiana, Inc. v. Westhafer,* 739 F.2d 1219, 1223-24 n. 4 (7th Cir.1984) (in light of *Seattle Times,* court need only undertake a Rule 26(c) good cause analysis without consideration of First Amendment); *Tavoulareas v. Washington Post Co.,* 737 F.2d 1170, 1172-73 (D.C.Cir.1984) (*en banc*) (same); *In re Agent Orange Product Liability Litigation,* 104

F.R.D. 559, 566 (E.D.N.Y.1985) (same). But *see* *Michelson v. Daly*, 590 F.Supp. 261, 266 (N.D.N.Y.1984)(*Seattle Times* demands a least restrictive alternative test for protective orders in civil discovery). This precedent gives us further confidence in our analysis.

We may summarize thus. *Seattle Times* required the district court merely to inquire whether the defendants had demonstrated good cause for the protective order; the ***1120** district court instead applied a least restrictive means test. The good cause standard is significantly less demanding than the least restrictive means test; the court's error, therefore, may have worked a serious detriment to the defendants. The court's error thus constitutes a clear error of law sufficient for our exercise of mandamus jurisdiction.

V. THE DISTRICT COURT'S STANDARD OF REVIEW

The district court also erred because it reviewed the magistrate's order under an incorrect standard. Title 28 U.S.C. § 636(b)(1)(A) (1982) explicitly states that the district court may modify the magistrate's order only if the district court finds that the magistrate's ruling was clearly erroneous or contrary to law. The district court in the instant case, however, held that *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), mandated plenary review regardless of the statutory standard of review. *Bose* held that when questions of constitutional fact arise in the first amendment context-questions like whether a speaker had "actual malice"; whether speech was libelous or an incitement to riot; whether pictures appeal to "prurient interests" or are "patently offensive"-an appellate court is bound to exercise plenary review on account of the crucial values at stake. *Id.* 104 S.Ct. at 1961-65. The district court reasoned that because it was acting as an appellate court in reviewing the magistrate's order, *Bose* should control. Dist.Ct.Op. at A17-A18.

The flaw in this logic stems from the same error discussed above, the district court's misreading of *Seattle Times*. Believing that *Seattle Times* made first amendment analysis an important part of its Rule 26(c) inquiry, the district court found that *Bose* applied. As we have seen, however, *Seattle Times* says exactly the opposite: that first amendment considerations are irrelevant to Rule 26(c) protective orders. Because the first amendment is irrelevant to the analysis, there are no grounds for extending *Bose* to this situation. The "clearly erroneous" standard obviously would have been less onerous for the defendants than was the district court's plenary review standard. Thus, the court's error may have harmed the defendants, and this error also constitutes a clear error of law sufficient for our exercise of mandamus jurisdiction.

These errors require that we reverse the district court's judgment and remand for reconsideration of good cause. Although it might be possible for us to review the magistrate's protective order ourselves, we feel it would be unwise to do so. Review of the order will require detailed consideration of the defendants' assertion of good cause. Such consideration would be exceedingly difficult without the district court's prior analysis of the matter under appropriate constitutional standards. *Cf.* *Tavoulareas v. Washington Post*, 737 F.2d 1170, 1172 (D.C.Cir.1984) (*en banc*) ("It would seem strange for the appellate court ... to decide the 'good cause' question initially-especially when, as here, the District Court, has had no opportunity to decide it free from erroneously imposed constitutional restraints."). It would be equally unwise for us to "tailor" or adjust the order, for the good cause hearing will likely reveal the appropriate shape that the protective order should take and it is thus better that any delineation of specifics await that hearing. We accordingly shall grant the writ, and allow the district court to reconsider the magistrate's protective order in a manner consistent with this opinion.

VI. *TWO REMAINING ISSUES*

In view of our holding, the district court will perforce be obliged to take second looks at the good cause issue (no specific good cause findings have been made), and at the magistrate's protective order. With respect to the later issue, we note that our holding has not resolved a critical aspect of the protective order litigation that the record reveals to be still festering: whether the district court was justified in its use ***1121** of the document-by-document approach as opposed to a broader approach in its reformulation of the magistrate's protective order. These two issues were contested in the district court, and colloquy at oral argument revealed that they are still at issue and

will likely arise again. Therefore, we address them for the guidance of the district court.[FN16]

> FN16. Discussion of these issues comports with the "instructional goals" of mandamus, *see* Bogosian v. Gulf Oil Corp., 738 F.2d 587, 592 (3d Cir.1984) ("review would comport with the instructional goals of mandamus,' " *quoting* United States v. Christian, 660 F.2d 892, 897 (3d Cir.1981)); *see also* Will v. United States, 389 U.S. 90, 107, 88 S.Ct. 269, 280, 19 L.Ed.2d 305 (1967) (mandamus review has a "vital corrective and didactic function").

A. *Embarrassment and Good Cause*

Whether defendants have shown good cause for a protective order has been the issue at the heart of this case, and will likely remain so. The defendants assert that although the material they have turned over does not contain trade secrets, it does include materials the dissemination of which would cause them annoyance and embarrassment sufficient to justify a broad protective order. The plaintiffs contend that the defendants have not made a sufficiently convincing showing of the harm they would suffer from dissemination and that their allegations of harm are merely conclusory.

[6] As the district court explained, Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. *See* United States v. Garrett, 571 F.2d 1323, 1326, n. 3 (5th Cir.1978) (requiring "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"); General Dynamics Corp. v. Selb Mfg. Corp., 481 F.2d 1204, 1212 (8th Cir.1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035 (1970 & Supp.1985). Moreover, the harm must be significant, not a mere trifle. *See, e.g.*, Joy v. North, 692 F.2d 880, 894 (2d Cir.1982) (refusing protective order where proponent's only argument in its favor was the broad allegations that the disclosure of certain information would "injure the bank in the industry and local community"), *cert. denied sub nom.* Citytrust v. Joy, 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983).

[7] Although there appears to be a lurking dispute as to what may constitute good cause for a protective order, *see* discussion *supra* at pp. 1114-15, we are satisfied that the district court understood and will apply on remand the principle that Rule 26(c) protects parties from embarrassment as well as from disclosure of trade secrets. We add to the district court's comments only our own understanding that, because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. *Cf. Joy v. North, supra* (a protective order will not issue upon the broad allegation that disclosure will result in injury to reputation); to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

B. *Administration of the Protective Order*

Under the district court's order, the defendants would be forced to demonstrate to ***1122** the Court on a document-by-document basis which documents should be protected and not disseminated before they could even be marked "confidential." The district court felt compelled to adopt this solution because it recognized that the burden of persuasion fell on the party seeking the protective order, and it believed that allowing defendants to mark documents confidential in the first instance-bound only by their good faith-and requiring plaintiffs to oppose the confidentiality designation would impermissibly shift the burden of proof to the plaintiffs. Dist.Ct.Op. at A29-30. The defendants object that the district court's order is unduly restrictive and burdensome.

[8] It is correct that the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head. That does not mean, however, that the party seeking the protective order must necessarily demonstrate to the court in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad "umbrella" protective order upon a threshold showing by one party (the movant) of good cause. Under this approach, the umbrella order would initially protect all documents that the producing party designated in good faith as confidential.[FN17] After the documents delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents. The burden of proof would be at all times on the movant; only the burden of raising the issue with respect to certain documents would shift to the other party.

> FN17. Admittedly, there is a danger here that counsel will err on the side of caution by designating confidential any potentially sensitive document. The judge must require that counsel not mark documents as protected under the order unless they are at least arguably subject to protection. Manual for Complex Litigation Second, (MCL 2d) § 21.431 (1985). MCL 2d provides that "[t]he designation of a document as confidential may be viewed as equivalent to a motion for protective order and subject to the sanctions of Fed.R.Civ.P. 26(g)." *Id.* We agree.

As the commentary in the *Manual for Complex Litigation Second* (MCL 2d) (1985) makes clear, the umbrella order approach has several advantages over the document-by-document method adopted by the district court in a complex case, [FN18] and ***1123** MCL 2d recommends the use of umbrella orders in complex cases.[FN19] The caselaw also supports the view that the use of umbrella orders in the district court is a useful method of dealing with large-scale discovery.[FN20]

FN18. First, because in any large-scale litigation the movant will likely have far more documents that it wants to designate as confidential than the respondent will object to being so designated, the umbrella order approach is less time-consuming and burdensome to the parties and the court than the document-by-document method. In a very large case, the document-by-document approach may be so costly that it may make large-scale litigation too expensive for all but the most affluent parties. Moreover, the time that it would take a judicial officer to rule on the protectability of thousands of documents could cripple the court. By contrast, the umbrella order will encourage efficiency and allow litigation to proceed more quickly. *See*MCL 2d § 21.431 at 51-54.

> Second, although a smooth, largely self-regulating discovery process should be the court's goal, *id.* at § 21.423 at 49, the document-by-document approach guarantees extensive involvement by the court in the discovery process, deterring the parties from themselves conducting discovery to a significant extent. The umbrella order approach we have described encourages parties to work problems out between and among themselves.
>
> Finally, the document-by-document approach may prevent the parties and the magistrate or judge from getting a broad overview of the documents. The magistrate or judge may be so burdened by the argument over each document that she or he will "lose the forest for the trees." This confusion is not a problem under the umbrella order solution proposed here.
>
> In *In re* "Agent Orange" Product Liability Litigation, 96 F.R.D. 582, 585 (E.D.N.Y.1983), Judge Pratt, sitting by designation, summarized the reasons underlying the umbrella order approach:
>
> The interest of preserving the efficient and

effective functioning of the discovery process weighs substantially in favor of a protective order, *In re Halkin, supra,* 598 F.2d at 192, and there is no question that this interest would be significantly impaired were there no protective order in this case.

The special master's protective order shifts the very slight burden of going forward to the proponents of dissemination. Those wishing to disseminate merely need to indicate which documents they wish to disseminate, and the burden is then upon those opposing dissemination to show "good cause" pursuant to FRCP 26(c) why the protective order should be continued. It is hoped that this procedure will result in the court's having to review only those particular documents a party wishes to disseminate, rather than having to review every document that some party wants covered by a protective order.

FN19. " 'Umbrella' protective orders, carefully drafted to suit the circumstances of the case, greatly expedite the flow of discovery material while affording protection against unwarranted disclosures." *Id.* at § 21.431 at 53 (footnote omitted); *see also id.* at § 41.36 at 379-83 (sample confidentiality order including umbrella provision).

FN20. *See, e.g., Chambers Development Co., Inc. v. Browning-Ferris Industries,* 104 F.R.D. 133, 135 (W.D.Pa.1985); *In re Korean Airlines Disaster of September 1, 1983,* 597 F.Supp. 621, 622-23 (D.D.C.1984); *In re "Agent Orange" Product Liability Litigation,* 96 F.R.D. 582, 583 (E.D.N.Y.1983); *Tavoulareas v. Piro,* 93 F.R.D. 24, 29-30 (D.D.C.1981); *see generally* Marcus, *Myth and Reality in Protective Order Litigation,* 69 Cornell L.Rev. 1, 8 (1983) (noting "[t]he tendency of courts to enter protective orders, sometimes sua sponte, limiting the use of *all* information produced through discovery") (footnotes omitted). This method was used by the court in *Palmer v. Liggett Group, Inc.,* ---F.Supp. ----,Civ. Action No. 83-2445-MA (D.Mass. Feb. 25, 1985), a cigarette products liability suit very similar to the one here. It was, of course, used by the magistrate in this case. *See supra* at n. 4.

There may be cases in which the document-by-document approach adopted by the district court, which deters over-designation of confidentiality and imposes heavier costs on parties making the confidentiality designation, will be preferable. A case in which the district court has reason to believe that virtually all confidentiality designations will be spurious may be such a case. Our purpose in extending the discussion is to explain that the district court erred to the extent that it felt *obliged* to utilize the document-by-document approach to avoid shifting the burden of proof of confidentiality, and to commend the umbrella approach for consideration of the district courts in this circuit in complex cases.

VII. *CONCLUSION*

Because of the district court's misinterpretation of *Seattle-Times v. Rhinehart* and its consequent errors in defining the appropriate good cause standard and its own scope of review of the magistrate's findings, we will grant the writ.

C.A.3 (N.J.),1986.
Cipollone v. Liggett Group, Inc.
785 F.2d 1108, 81 A.L.R. Fed. 443, 54 USLW 2485, 4 Fed.R.Serv.3d 170

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EXHIBIT 3

Naftchi v. New York University Medical Center
S.D.N.Y.,1997.

United States District Court,S.D. New York.
N. Eric NAFTCHI, Plaintiff,
v.
NEW YORK UNIVERSITY MEDICAL CENTER, et al., Defendants.
No. 96 Civ. 8116 LAK.

April 22, 1997.

In professor's national origin and age discrimination action against university, dean, and others, professor sought to depose dean, and defendants responded with letter which was treated as motion for protective order. The District Court, Kaplan, J., held that defendants were not entitled to protective order against taking dean's deposition, based on claims that dean had no recollection of communicating with plaintiff in the past ten years and did not make decisions concerning plaintiff's salary, research funding, and office or laboratory space.

Motion denied.

West Headnotes

[1] Federal Civil Procedure 170A 1272.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1272.1 k. In General. Most Cited Cases

Federal Civil Procedure 170A 1332

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)1 In General
170Ak1332 k. Objections to Taking and Grounds for Refusal. Most Cited Cases
The scope of discovery in federal civil litigation is broad and, in consequence, it is exceedingly difficult to demonstrate an appropriate basis for order barring taking of a deposition. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1332

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)1 In General
170Ak1332 k. Objections to Taking and Grounds for Refusal. Most Cited Cases
In ordinary circumstances, it does not preclude taking of deposition that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge.

[3] Federal Civil Procedure 170A 1332

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)1 In General
170Ak1332 k. Objections to Taking and Grounds for Refusal. Most Cited Cases
In professor's national origin and age discrimination action against university, dean and others, defendants were not entitled to protective order against taking dean's deposition, based on claims that dean had no recollection of communicating with professor in the past ten years and did not make decisions concerning professor's salary, research funding, and office or laboratory space; it was not claimed that dean had not spoken with others about the professor, that he knew nothing about the decisions, or that he had no information pertinent to the lawsuit or that could lead to relevant evidence. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1332

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)1 In General
170Ak1332 k. Objections to Taking and Grounds for Refusal. Most Cited Cases
Bare possibility of abuse does not afford appropriate basis on which to block deposition entirely.

*131 Eric M. Nelson, New York City, for Plaintiff.
Ada Meloy, Deputy General Counsel, New York University, New York City, for Defendants.

MEMORANDUM OPINION

KAPLAN, District Judge.
The plaintiff in this action, a tenured professor of rehabilitation medicine employed by New York University Medical Center ("NYUMC"), brings this action against NYU, Dr. Saul Farber, who is the dean and chairman of the Department of Medicine of the NYU School of Medicine, and other defendants. He contends that the defendants have discriminated against him on the basis of his age and/or national origin. The matter is before the Court in consequence of defendants' resistance to plaintiff's effort to take the deposition of Dr. Farber.

Facts

Feelings appear to run high on both sides of this matter. Dr. Naftchi views himself as a victim of persecution. Dr. Farber and the other defendants appear to perceive themselves as targets of baseless harassment by an unhappy faculty member. One side or the other may be right-indeed, if there proves to be at least a grain of truth on each side, it would be far from the first such controversy in which that was so. But the parties must curb their sense of outrage in the interests of an orderly, economical, and prompt disposition of the litigation.

Plaintiff alleges that Dr. Farber was intimately involved in at least some of the episodes that form the basis of the complaint. He asserts:

"14. All of the harms, losses, injuries and damages suffered by Plaintiff have been visited upon him by or at the behest of Defendants, or any of them. * * *

"15. Defendant Farber, on one or more occasions, in his capacity as Dean and Provost of NYUMC, as well as otherwise, has personally barred Plaintiff from applying for outside grant or other research funding. From time to time, Dr. Farber has *132 also personally directed that funds donated by the Murry and Leonie Guggenheim, and Edmund Guggenheim Foundations ..., and the Metabolic Research Fund, be denied to Plaintiff for the conduct of his research, notwithstanding the specific terms and understandings under which such funds were to be administered by Defendants for the benefit of Plaintiff's research."

Moreover, he contends that he has been denied salary increases provided to other, similarly situated members of the faculty, that Dr. Farber has ignored his complaints and rendered assurances that were not fulfilled, and that unnamed defendants sought to pressure him into retiring, a matter of which-if it occurred-the dean presumably was aware.

Defendants have filed a motion to dismiss the complaint. Although they did not seek a stay of discovery pending resolution of the motion, they simply-and inappropriately-refused to participate in discovery. Accordingly, the Court held a conference call with counsel on April 4, 1997. The Court deferred discovery as to the compensation and treatment of faculty members other than the plaintiff pending resolution of the motion, but declined to stay all discovery and directed defendants to answer certain interrogatories and to produce certain documents by April 24, 1997. Defendants then objected to producing Dr. Farber for examination, contending that if he were examined before the initial discovery was completed, he would be compelled to return for another session after plaintiff obtained the documents and other information. The Court made clear that plaintiff would be permitted to depose Dr. Farber only once and gave plaintiff one week in which to determine whether he wanted to examine Dr. Farber now or later.

Although the Court has not been informed by plaintiff as to his wishes in respect of Dr. Farber, the Court's ruling evidently did not sit well with defendants. On April 18, 1997, the Court received a lengthy letter from defendants' counsel. She now argues that plaintiff should not be permitted to

examine Dr. Farber *at any time* because "he has no recollection of communicating with plaintiff in the past ten years" and did not make decisions concerning plaintiff's salary, research funding, and office or laboratory space. Dr. Farber has submitted an affidavit to similar effect. The Court treats defendants' communications as a motion for a protective order.

Discussion

[1][2] The scope of discovery in federal civil litigation is broad. The parties are entitled to pursue "any matter, not privileged, which is relevant to the subject matter involved in the pending action ... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1); *see Johnson v. Nyack Hospital*, 169 F.R.D. 550, 555-56 (S.D.N.Y.1996). In consequence, it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2037, at 494-95 (1994) (hereinafter WRIGHT). As the Second Circuit wrote in *Investment Properties Int'l, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 708 (2d Cir.1972), "an order to vacate a notice of taking [of a deposition] is generally regarded as both unusual and unfavorable ..." *See also Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir.1979) (prohibition of deposition inappropriate absent extraordinary circumstances). Nor, in ordinary circumstances, does it matter that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge. WRIGHT § 2037, at 500.

There are, to be sure, some exceptions to this rule. Courts on occasion have barred the depositions of senior corporate officers where it was clear that the witness lacked personal familiarity with the facts of the case. *E.g., Thomas v. IBM Corp.*, 48 F.3d 478 (10th Cir.1995).

[3] Dr. Farber's affidavit, which obviously was prepared with considerable care, does not assert that he lacks familiarity with any of the matters at issue in the case. He says ***133** that he has not, as far as he recalls, spoken with plaintiff in over ten years-but he certainly does not say that he has not spoken with others about plaintiff. He says that decisions concerning plaintiff's salary, research funding, and office and laboratory space have not been made by him-but he does not say that he knows nothing about these matters. He says that he does not believe that he has personal knowledge of plaintiff or his activities over the past decade-but he certainly does not say that he lacks any information pertinent to the lawsuit or that could lead to relevant evidence. Hence, there is no basis for precluding a deposition of Dr. Farber altogether.

[4] This is not to say that the Court is blind to the possibility of harassment. That risk was what prompted the Court to preclude plaintiff from deposing Dr. Farber twice-once before and once after the completion of the initial document phase of discovery. But the bare possibility of abuse does not afford an appropriate basis on which to block the deposition entirely.

Conclusion

The question whether to grant the relief sought, assuming it is not precluded altogether as a matter of law, manifestly lies within this Court's discretion. Defendants' recent submission has added nothing to the fund of information before the Court at the time of the conference call. The motion therefore should not have been made.

Defendants' motion for a protective order barring the deposition of Dr. Saul Farber is denied in all respects. Defendants shall produce Dr. Farber for examination at time to be agreed upon by the parties or, in default of agreement, fixed by the Court.

SO ORDERED.

S.D.N.Y.,1997.
Naftchi v. New York University Medical Center
172 F.R.D. 130, 73 Fair Empl.Prac.Cas. (BNA) 1411, 71 Empl. Prac. Dec. P 44,790, 38 Fed.R.Serv.3d 128, 118 Ed. Law Rep. 693

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EXHIBIT 4

Motsinger v. Flynt
M.D.N.C.,1988.

United States District Court,M.D. North Carolina
,Winston-Salem Division.
Dr. G. Ray MOTSINGER, Plaintiff,
v.
Larry FLYNT and Larry Flynt Productions, Inc.,
Defendants.
No. C-87-847-WS.

March 15, 1988.

Civil plaintiff moved for extension of time within which to serve defendant, and for postponement of plaintiff's deposition. The District Court, Russell A. Eliason, United States Magistrate, held that: (1) in removal action, 120-day service period commences run from date of removal, and thus motion for additional time within which to serve process made within that period would be allowed upon showing of excusable neglect, and (2) plaintiff was entitled to six-week stay in taking of his deposition.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A 417

170A Federal Civil Procedure
170AIII Process
170AIII(B) Service
170AIII(B)1 In General
170Ak417 k. Time for Making. Most Cited Cases
Motion for additional time within which to serve process, made after expiration of 120-day service period, is governed by good-cause standard as opposed to excusable neglect standard, which would be applicable if motion was made prior to expiration of service. Fed.Rules Civ.Proc.Rules 4(j), 6(b)(2), 28 U.S.C.A.

[2] Removal of Cases 334 79(1)

334 Removal of Cases
334VI Proceedings to Procure and Effect of Removal
334k78 Time for Taking Proceedings
334k79 In General
334k79(1) k. In General. Most Cited Cases
In removal action, 120-day service period commences run from date of removal, and thus motion for additional time within which to serve process made within that period would be allowed upon showing of excusable neglect; excusable neglect was shown where defendant gave plaintiff and court address which could not be used for service, possibly in attempt to avoid service. Fed.Rules Civ.Proc.Rule 4(j), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1358

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)2 Proceedings
170Ak1355 Orders for Protection of Parties and Deponents Before Oral Examination
170Ak1358 k. Order That Deposition Be Not Taken. Most Cited Cases
Absent strong showing of good cause and extraordinary circumstances, court should not prohibit altogether taking of deposition; even when party only seeks protective order staying deposition, he still has heavy burden of demonstrating good cause.

[4] Federal Civil Procedure 170A 1366

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)2 Proceedings
170Ak1355 Orders for Protection of Parties and Deponents Before Oral Examination
170Ak1366 k. Motions for Protective Orders and Proceedings Thereon. Most Cited Cases

Doctor's certificate setting out plaintiff's illness and basis for requesting exemption from deposition will often justify short stay in taking of deposition, but in order to obtain extended stay, plaintiff will have to come forward with detailed information supporting physician's opinion and, if necessary, be willing to submit his physician for examination by court or by defendant on behalf of court.

[5] Federal Civil Procedure 170A ⚿1366

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)2 Proceedings
170Ak1355 Orders for Protection of Parties and Deponents Before Oral Examination
170Ak1366 k. Motions for Protective Orders and Proceedings Thereon. Most Cited Cases
Plaintiff's physician's statement, though brief and without history or treatment being given, was sufficient to warrant stay of taking of plaintiff's deposition for six weeks, where request was unopposed.

*374 David R. Crawford, Winston-Salem, N.C., for plaintiff.
David M. Clark, Stanley F. Hammer, Greensboro, N.C., Carl Grumer, Beverly Hills, Cal., for defendants.

ORDER

RUSSELL A. ELIASON, United States Magistrate.
This case presents two issues for resolution. One, which apparently is of first impression, concerns whether the time limitation to serve process contained in Rule 4(j), Fed.R.Civ.P., applies to cases which have been removed to federal court from state court pursuant to 28 U.S.C. § 1441, *et seq.*, and if so, how should it be computed. The second concerns plaintiff's attempt to postpone his deposition due to illness.

I.

For the first issue, plaintiff moves for an extension of time within which to perfect service of process on both defendants. The individual defendant resists and urges the Court to dismiss the action because plaintiff has failed to serve him within the 120-day time period mandated by Rule 4(j), Fed.R.Civ.P.

Plaintiff filed the complaint on September 28, 1987. He served the corporate defendant with process on November 2, 1987. The summons for the individual defendant was returned with a notation that the individual could not be personally served at the address given. A second summons was sent to Los Angeles, California, for service and was again returned with an attempted service date of October 8, 1987. In order to keep the summons alive in state court, plaintiff caused an alias and pluries summons to be issued on November 6, 1987, as to both defendants. These were not sent to the Sheriff in Los Angeles since prior service on the individual had proved ineffective.

In the meantime, defendants filed a petition for removal on December 2, 1987, claiming diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332. The action was removed and defendants filed their answer on December 7, 1987 raising defenses of lack of personal jurisdiction over the defendants and improper service. Plaintiff procured another alias and pluries summons from the state court on December 6, 1987. Service was not attempted with this summons due to the case having been removed.

In this Court, on December 14, 1987, an Order was entered requiring the respective parties to provide their names, addresses and telephone numbers by letter. Defendants responded on December 23, 1987 stating the corporate headquarters of the corporation was located at an address in Beverly Hills, California, and gave a telephone number. The individual's address and telephone number was stated to be the same. This letter was not sent to plaintiff's counsel. In the early part of January 1988, at plaintiff's counsel's request, counsel for the individual defendant agreed to confer with his client to see whether he would waive any objection to process so that the case could proceed on the merits. No response was given to plaintiff's counsel prior to January 26, 1988, which is 120 days after the complaint was filed in state court.

On February 1, 1988, plaintiff caused this Court to issue two summons as to both defendants in order to insure that this action would remain alive for purposes of the state statute of limitations. He

reviewed the file in federal court on February 9, 1988 and there discovered defendants' counsel's letter in the file concerning the addresses of defendants. On February 12, 1988, plaintiff filed his motion to extend the time for serving defendants and he also attempted service via certified mail as to both defendants at the new address. An individual other than the defendant or the corporate agent listed for the corporation *375 received the summons as the agent of the defendants. Plaintiff's counsel adds that newspaper accounts indicate the individual defendant is not residing in Los Angeles, California, and he has learned that defendant may presently be residing in Florida. Plaintiff is attempting to serve the individual defendant through a private process server.

Discussion

Rule 4(j), Fed.R.Civ.P., requires the service of a summons and complaint to be made on defendants within 120 days after the filing of the complaint. If this does not occur, the Court is instructed to dismiss the action unless good cause for the failure of service can be shown.[FN1] *See* 4A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1137 at 386 (1987). Defendant Larry Flynt contends that plaintiff was required to serve him within 120 days after the complaint was filed in state court or on or before January 26, 1988. It is agreed by all that plaintiff did not do this. In addition, defendant states that plaintiff's request for an extension of time, being made after January 26, 1988, is untimely and subject to the provisions of Rule 6(b)(2), Fed.R.Civ.P., which requires that a motion for an extension of time made after the expiration of the original time period must be accompanied by a showing of excusable neglect.

FN1. Rule 4(j), Fed.R.Civ.P.:

> (j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service on a foreign country pursuant to subdivision (i) of this rule.

Rule 6, Fed.R.Civ.P., governs extensions of time in general. If the motion for an extension is filed before the expiration of the time period for which an extension is sought, the party need only show cause. Rule 6(b)(1). If a party should wait until after the expiration of time, then the burden is more rigorous and requires more than inadvertence, mistake, or unfamiliarity with the rules. Rule 6(b)(2). Rather, the party must demonstrate his good faith, a reasonable basis for noncompliance, and lack of prejudice to defendant in making the untimely request for an extension. 4A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1165 (1987).

This distinction made in Rule 6, Fed.R.Civ.P., between timely and untimely requests for extensions, also applies to motions made with respect to Rule 4(j), Fed.R.Civ.P. Motions for additional time to serve process made prior to the expiration of the 120-day period of Rule 4(j) will be more liberally granted than those which are made after the expiration. *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D.Minn.1987). Motions for an extension of the service time made after the running of the 120-day period require a considerably greater showing of cause.

[1] A motion for additional time within which to serve process made after the expiration of the 120-day time period set in Rule 4(j), Fed.R.Civ., is governed by the specific good cause standard of that rule as opposed to the excusable neglect standard of Rule 6(b)(2), Fed.R.Civ.P. *U.S. For Use and Benefit of DeLoss v. Kenner General, Inc.*, 764 F.2d 707, 711 (9th Cir.1985) (hereinafter cited as *Kenner General*). Several factors support this decision. Rule 4(j) is specifically designed to encourage and prod counsel into expediting service in order that the merits of the case may be reached.[FN2] Therefore, its good cause standard*376 will be the one directly designed for dealing with the problem at hand. *Id.* The good cause standard of Rule 4(j) will likely be as strict or even more stringent than the excusable neglect standard of Rule 6(b)(2). *Id.*; *Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 884-85 (3d Cir.1987); *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1306 (5th Cir.1985).

FN2. The standard for determining good cause for extending the 120-day period for service of process is still developing. Notwithstanding, the courts considering the issue have determined that although Congress did not explicitly define the term, it expected it to be strictly applied and in fact the legislative history gives only one example of good cause-that being where a defendant intentionally avoids service. Lovelace v. Acme Markets, Inc., 820 F.2d 81, 84 (3d Cir.1987). In determining good cause a court need not consider the fact that a dismissal without prejudice may be tantamount to a dismissal with prejudice because of statute of limitation problems. Id. at 84; Townsel v. Contra Costa County, Cal., 820 F.2d 319, 320 (9th Cir.1987); U.S. for Use and Benefit of DeLoss v. Kenner General, Inc., 764 F.2d 707, 711 n. 5 (9th Cir.1985). Moreover, unlike Rule 6(b)(2), Fed.R.Civ.P., a failure to find good cause pursuant to Rule 4(j), Fed.R.Civ.P, does not require a finding that defendant has been prejudiced before dismissal may be ordered. Quann v. Whitegate-Edgewater, 112 F.R.D. 649, 661 (D.Md.1986); Boykin v. Commerce Union Bank of Union City, Tenn., 109 F.R.D. 344, 348 (W.D.Tenn.1986).

> In general, an attorney's inadvertence or ignorance, or misplaced reliance, will not serve to excuse a failure to timely serve. *Townsel v. Contra Costa County, Cal., supra; Lovelace v. Acme Markets, Inc., supra.* Rather, the Court will look to see whether factors outside of a party's control prevented timely service of process, such as evasive or misleading conduct on behalf of defendant or illness on behalf of plaintiff. LeMaster v. City of Winnemucca, 113 F.R.D. 37 (D.Nev.1986); Baden v. Craig-Hallum, Inc., 115 F.R.D. 582 (S.D.Minn.1987). Lack of effort or half-hearted efforts on the part of a plaintiff will likely lead to dismissal. *U.S. for Use and Benefit of DeLoss v. Kenner General, supra; Atwood v. Memorial Hospital at Gulfport,* 115 F.R.D. (S.D.Miss.1986).

Utilizing the more specific good cause standard of Rule 4(j) does not render the effects of Rule 6(b)(2) nugatory. Rather, an untimely request for an extension under Rule 4(j) automatically invokes the threat of dismissal whether the Court considers the matter *sua sponte,* on plaintiff's motion for an extension of time, or pursuant to a defendant's motion for dismissal. *Kenner General, supra,* at 711. Moreover, a party's lack of diligence in filing the request for an extension itself may be used as an additional sign of lack of diligence and good cause for the motion. Quann v. Whitegate-Edgewater, 112 F.R.D. 649, 661 (D.Md.1986). Therefore, if defendants are correct in arguing that the 120-day service period runs from the filing of the complaint in state court, plaintiff's motion for an extension is untimely and under the strict standards applicable to such motions the Court would likely find that plaintiff has failed to demonstrate good cause.[FN3] However, because the Court determines that in a removal action the 120-day service period commences to run from the date of removal, it turns out that plaintiff's motion for an extension is timely and will be granted.

> FN3. Good cause may not be found in the fact that defendant's counsel did not provide an answer to whether his client would waive process until after the running of the 120-day period because he was not under any obligation to timely respond. Nor is there any indication that defendant intentionally lulled plaintiff into not filing a timely motion to extend the service time period by requesting more time to consider plaintiff's request. Moreover, plaintiff's reliance on defendant, even if in good faith, is simply not appropriate. *Lovelace v. Acme Markets, Inc., supra.*
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> Nor does the Court find good cause from the fact that defendant allegedly provided the Court and him with an inadequate or unusable address. The trouble with this argument is that plaintiff did not find out about the address until after January 26, 1988 and the supposed running of the 120-day period. Plaintiff was aware of this Court's order requiring the parties to supply an address. Therefore, it can be assumed that plaintiff knew or should

> have known that defendants likely sent something to the Clerk of Court concerning their addresses shortly after the Clerk's request in mid-December. Yet, plaintiff did not check the Clerk's file until well into February. Had plaintiff checked the Clerk's file within a reasonable period of time and used the address given by defendant without success, the Court might be willing to find that defendant misled plaintiff and thereby attempted to evade service of process, justifying a finding of good cause. This is not the case here. The facts show that plaintiff made an early attempt to serve process on defendant and then did nothing for a significant period of time.

Defendants argue that the 120-day service period should be measured from the filing of the original complaint in state court. They base this conclusion on their argument that 28 U.S.C. § 1448 provides that once a case is removed to federal court process may be completed in the same manner as if the case had been originally filed in this court. The Court does not feel that the interplay between the removal provisions of 28 U.S.C. § 1441, *et seq.*, and Rule 4(j), Fed.R.Civ.P., call for such a result.

Once a case has been removed from state court, the federal court applies the Federal *377 Rules of Civil Procedure and the case is treated as though it were originally commenced in federal court. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3738 at 556-57 (1985).[FN4] In applying the Federal Rules of Civil Procedure to a removed action, the question arises as to whether the federal rules should be retroactively applied to judge conduct performed in state court in accordance with state procedure. Rule 81(c), Fed.R.Civ.P., states that the federal rules govern procedure after, not before, removal. Moreover, retroactive application of federal court rules on otherwise permissible state court pleadings may create real unfairness. Thus, in *Columbus, Cuneo, Cabrini Med. Ctr. v. Holiday Inn*, 111 F.R.D. 444 (N.D.Ill.1986), the court refused to apply Rule 11, Fed.R.Civ.P., pleading standards to a state court complaint filed prior to removal nor would it impose attorney's fees as costs for a voluntary dismissal pursuant to Rule 41(a)(1), Fed.R.Civ.P., when the plaintiff immediately requested such dismissal after the action had been removed. *See Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir.1987)-(collecting cases).

> FN4. This does not mean that federal law entirely subplants state law. For actions removed on the basis of diversity of citizenship jurisdiction, state law not only governs the substantive jurisdictional questions but also the sufficiency of the state court service of process. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3738 at 560-61 (1985); *Usatorres v. Marina Mercante Nicaraguenses, S.A.*, 768 F.2d 1285 (11th Cir.1985). State process which has been served may be perfected and facial errors corrected, but if it has not yet been served, it is void and plaintiff must obtain a federal summons and serve it. 28 U.S.C. § 1448; *Beecher v. Wallace*, 381 F.2d 372 (9th Cir.1967); *but see Continental Ill. Nat., etc. v. Protos Shipping*, 472 F.Supp. 979 (N.D.Ill.1979). On the other hand, a plaintiff does not obtain vested rights in state court procedures and rulings merely because the case was filed in state court prior to removal. The federal court may reconsider motions to dismiss or entries of default or apply a federal court limitation on the number of interrogatories even though state court rules do not contain such limitations and the interrogatories were filed prior to removal. *McIntyre v. K-Mart Corp.*, 794 F.2d 1023 (5th Cir.1986).

[2] The principle of avoiding unfairness by refusing to retroactively apply the federal rules to pre-removal pleadings or activity comfortably fits in with a construction of Rule 4(j), Fed.R.Civ.P., which starts the running of the 120-day period from the date of removal. To use the date an action was filed in state court could create unfairness.[FN5] On the other hand, Rule 4(j) would itself be disserved were its time parameters not at some time enforced. Using the date a case is removed to federal court provides an appropriate balance which accommodates the federal interest in insuring that process will be timely served yet does not penalize the plaintiff or give undue advantage to the defendant occasioned solely on account of the removal and the application of the new

federal duty to otherwise proper state court conduct.[FN6]

FN5. Pursuant to 28 U.S.C. § 1446(b), a defendant may remove an action prior to service of process upon him. A defendant must remove an action to federal court within thirty (30) days after receipt, "through service or otherwise," of a copy of the initial pleading setting out the claim. *See* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3732 at 516 (1985). As a result, it is possible that 120 days from filing of the complaint could pass without a defendant being served. Then, having notice of the action, a defendant could remove it to federal court and immediately move for dismissal pursuant to Rule 4(j), Fed.R.Civ.P. The plaintiff would immediately be in a predicament since 120 days would have passed since the filing of the original complaint and he would not have made a motion for an extension of time to serve process. Furthermore, if state court process is being served but has not yet been served, the removal would require federal process to issue in order for service to be completed. *Beecher v. Wallace*, 381 F.2d 372 (9th Cir.1967).

FN6. This solution is also consistent with the Supreme Court's resolution of an analogous situation. In *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974), the problem was what to do when a state court issues a temporary restraining order and the matter is removed to federal court. The removal statutes provide that all orders in state court should remain in full force and effect until dissolved by the district court. 28 U.S.C. § 1450. Literally construed, this meant that a state court temporary restraining order, which would otherwise expire, remained in effect much longer by the mere fact of removal. Had the federal court issued the temporary restraining order, it would have a maximum 20-day life pursuant to Rule 65(b), Fed.R.Civ.P. Thus, removal of the action could produce a result that was not sanctioned by either federal or state law.

> In order to prevent a removal from skewing the situation, the Supreme Court held that when an action had been removed to federal court, and prior to removal the state court had issued a temporary restraining order, the order could not remain in force after removal any longer than it could have had the action remained in state court, and in any event, could not remain in effect any longer than the time provided for by Rule 65(b), Fed.R.Civ.P. In a similar manner with respect to the instant case, starting the 120-day service time from the date of removal only imposes the federal standard at the time the matter becomes a federal case. Should the state law have a more stringent standard for service, the federal courts may take cognizance of it as may be appropriate.

*378 In the instant case, the action was removed on December 2, 1988. Plaintiff timely filed for an extension of time to serve process on February 12, 1988, which is well within the 120-day period. Plaintiff has presented more than sufficient facts for the Court to grant an extension of time to complete service in accordance with Rule 6(b)(1), Fed.R.Civ.P. It appears that the individual defendant gave plaintiff and this Court an address which cannot be used for service. The individual defendant may be attempting to avoid service. Under these circumstances, the Court has no hesitation in granting an extension of time to serve. The Court will grant plaintiff sixty (60) days to complete service. This extension shall apply to both defendants and plaintiff may re-serve the corporate defendant should he desire.

II.

Plaintiff's second motion requests a protective order prohibiting his deposition and an extension of the discovery period and the time set for the court ordered arbitration hearing. Plaintiff shows that his deposition was originally scheduled in early February 1988 and continued because of his illness. One month later, plaintiff reports that his congestive heart condition still makes his deposition impossible.

Plaintiff includes a note from his physician stating that he should be excused from court appearances for approximately six weeks. Defendants oppose any extension of either discovery or the arbitration hearing for more than thirty (30) days. They do not oppose delaying the deposition.

[3][4] Absent a strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition. Even when a party merely seeks a protective order staying a deposition, he still has a heavy burden of demonstrating good cause. *Medlin v. Andrew*, 113 F.R.D. 650 (M.D.N.C.1987). A doctor's certificate setting out plaintiff's illness and the basis for requesting exemption from a deposition will often justify a short stay in the taking of a deposition. The request for an extended stay of a deposition requires more than a conclusory statement by a physician. *Id.* For such requests, the plaintiff will have to come forward with detailed information supporting the opinion and, if necessary, be willing to submit his physician for examination by the court or by defendant on behalf of the court. *Id.*

[5] In the instant case, the physician's statement is brief and without history or the treatment being given. On the other hand, the stay is also both short and finite, and it is unopposed. Therefore, it may be granted even though the request is rather conclusory. Also, considering all of the circumstances in this case, including plaintiff's health and the problem of service, the Court will grant a limited extension of discovery and the arbitration dates.

IT IS THEREFORE ORDERED that plaintiff's motion to extend the time to perfect service of process on both defendants is granted and plaintiff shall have to and including April 9, 1988 within which to serve both defendants in this action. Consequently, defendant Larry Flynt's motion to dismiss pursuant to Rule 4(j), Fed.R.Civ.P., is denied.

IT IS FURTHER ORDERED that plaintiff's motion for a protective order to continue his deposition and to extend the discovery and arbitration periods is granted; and, IT IS ORDERED that the parties are prohibited from deposing plaintiff until on *379 or after March 30, 1988, that discovery is extended to and including April 15, 1988, and that the arbitration hearing shall be held on or before June 15, 1988.

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