

1 Joint Motion to Strike Jury Demand, as well as Defendants' motions to
2 dismiss, ECF Nos. 33 & 35, at this time.

3 **A. Mrs. Busche's Motion to Stay**

4 Mrs. Busche seeks a stay of this litigation until at least
5 November 14, 2014, so that her 2013-based whistleblower retaliation
6 claims ("2013-based claims") against URS and BNI can be addressed by
7 the Department of Labor (DOL), through her November 13, 2013
8 administrative complaint, prior to them being addressed in this
9 lawsuit. If the DOL does not address her 2013-based claims by
10 November 13, 2014—within one year of her administrative complaint,
11 Mrs. Busche will opt out of the DOL administrative proceeding. Mrs.
12 Busche believes that her 2013-based claims relate to her 2010/11-based
13 retaliation claims, which she presented to the DOL in an earlier
14 administrative complaint and therefore it is unnecessary for her to
15 present her 2013-based claims to the DOL. However, in light of
16 Defendants' pending motions to dismiss her 2013-based claims for
17 failure to exhaust administrative remedies, ECF Nos. 33 & 35, Mrs.
18 Busche seeks permission to stay this lawsuit until her 2013-based
19 claims have been before the DOL for one year. Both Defendants
20 strongly oppose a stay, contending a stay reduces Defendants' ability
21 to have the allegations in this lawsuit resolved in a timely manner
22 and that this is simply another tactic employed by Mrs. Busche to
23 stall providing discovery to Defendants.

24 **1. Standard**

25 The district court "has broad discretion to stay proceedings as
26 an incident to its power to control its own docket." *Clinton v.*

1 *Jones*, 520 U.S. 681, 706-07 (1997) (citing *Landis v. N. Am. Co.*, 299
2 U.S. 248 (1936)). In determining whether to grant a motion to stay,
3 "the competing interests which will be affected by the granting or
4 refusal to grant a stay must be weighed." *Lockyer v. Mirant Corp.*,
5 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX Inc. v. Hall*, 300
6 F.2d 265, 268 (9th Cir. 1962)). These interests include: 1) the
7 possible damage which may result from a stay, 2) the hardship or
8 inequity which a party may suffer if a stay is not entered, and 3)
9 whether a stay simplifies or complicates issues, proof, and questions
10 of law. *Id.* The moving party bears the burden of proving that a stay
11 is warranted and must "make out a clear case of hardship or inequity
12 in being required to go forward." *Clinton*, 520 U.S. at 708; *Landis*,
13 299 U.S. at 255.

14 **2. Analysis**

15 After balancing the applicable interests, the Court determines a
16 limited stay is warranted and stays the lawsuit until May 1, 2014. A
17 stay until May 1, 2014, provides the government (the DOL) with
18 approximately six months to take action on Mrs. Busche's
19 administrative complaint. On May 1, 2014, Mrs. Busche is to file a
20 notice with the Court, advising what action, if any, has been taken on
21 her administrative complaint by the DOL. The Court will then be
22 better informed as to whether the DOL intends to address Mrs. Busche's
23 recent administrative complaint and whether discovery and motions
24 should proceed in this lawsuit regarding the 2013-based claims. This
25 limited stay also provides the Ninth Circuit with additional time to
26 rule on whether a claim under the Energy Reorganization Act (ERA), 42

1 U.S.C. § 5851(b)(4), may be tried to a jury: an issue the Ninth
2 Circuit is to address in *Tamosaitis v. URS Inc.*, No. 12-35924 (9th
3 Cir. filed Nov. 9, 2011). Whether Mrs. Busche's ERA claims can be
4 tried to a jury may well impact the discovery process and the parties'
5 pretrial preparations. Accordingly, the Court determines this limited
6 stay is necessary. Any potential prejudice that Defendants will
7 suffer from this limited stay is mitigated by the fact the Court must
8 reset the March 2, 2015 trial, due to its own calendar. Following
9 review of Mrs. Busche's May 1, 2014 notice, the Court will set a
10 hearing to discuss the entry of a new scheduling order.¹ No later
11 than May 8, 2014, Mrs. Busche is to be prepared to disclose the
12 discoverable documents and information requested by Defendants.

13 Because this lawsuit is stayed until May 1, 2014, the Court
14 directs the Clerk's Office to term (for CM-ECF purposes) Defendants'
15 motions to dismiss, ECF No. 33 & 35, and Defendants' Motion to Strike
16 Jury Demand, ECF No. 28, at this time. If following the stay
17 Defendants wish to revive a particular motion, they may do so by
18 filing a Notice to Revive that Previously-Filed Motion, and in that
19 Notice list each of the court filings related to that motion, so as to
20 permit the Clerk's Office to administratively revive the motion.

21 **B. Mrs. Busche's Motion for Protective Order**

22 Mrs. Busche filed this motion for protective order, ECF No. 25,
23 on October 9, 2013. Following the filing of Ms. Busche's motion for
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25 ¹ A possible new trial date is **April 27, 2015**.

1 protective order, the Court entered an Order on October 15, 2013, ECF
2 No. 26, addressing an earlier filed motion for protective order by
3 Mrs. Busche. Mrs. Busche recognizes the Court's October 15, 2013
4 Order moots part of her instant motion for protective order.
5 Accordingly, remaining before the Court is whether a protective order
6 should issue as to URS's Request for Production (RFP) Nos. 6, 8, 15,
7 and 18 and Interrogatory No. 7, and BNI's Interrogatory Nos. 1 and 11
8 and RFP Nos. 1 and 3. These discovery requests are divided into four
9 categories: medical, tax returns, Defense Nuclear Facilities Safety
10 Board (DNFSB), and general. The Court addresses each in turn, while
11 recognizing that a civil litigant may seek discovery of relevant, non-
12 privileged information. Fed. R. Civ. P. 26(b)(1).

13 First, as to Mrs. Busche's requested medical records, Mrs.
14 Busche clarifies that she only seeks garden-variety emotional distress
15 damages. Therefore, based on Mrs. Busche's clarification, URS
16 withdraws its Interrogatory No. 7 and RFP No. 15, and BNI withdraws
17 its Interrogatory No. 11. Accordingly, Mrs. Busche's motion is denied
18 as moot in this regard. *See Olsen v. Cnty. of Nassau*, 615 F. Supp. 2d
19 35 (E.D.N.Y. 2009) (recognizing that garden-variety emotional distress
20 claims are generally only supported by the plaintiff's testimony).

21 Second, Mrs. Busche advised that her damages claim (as of the
22 date of the hearing) did not include a request for front-pay damages
23 as she was still employed and had not been denied promotion
24 opportunities. Based on this representation, URS withdrew its RFP No.
25 18. Therefore, Mrs. Busche's motion is denied as moot in this regard.

1 The third category is URS's DNFSB-related discovery request: URS
2 RFP No. 8, which states:

3 Produce all documents related to or pertaining to any
4 testimony that you offered before the DNFSB, including but
5 not limited to transcripts of both public and closed
6 testimony; video/audio recordings of both public and closed
7 testimony; notes/outlines/scripts prepared in advance of
8 your testimony; and correspondence with members of/counsel
9 for the DNFSB.

10 ECF No. 25-3 at 21. Testimony during a closed-DNFSB hearing is
11 typically treated as confidential. See 10 C.F.R. § 1704.5. Based on
12 the regulatory language and purpose, the Court rules that an
13 individual who testifies during a closed-DNFSB hearing reasonably
14 expects that her testimony be kept confidential. The confidential
15 nature of this testimony is not lessened when the individual receives
16 an electronic transcript of her testimony in order to review the
17 transcript for accuracy. However, when the witness saves a copy of
18 the transcript to her employer's computer system and does not take
19 steps to retain the confidential nature of the transcript of her
20 testimony, the employee waives her right to claim that her testimony
21 is confidential. Mrs. Busche appropriately recognizes that she waived
22 her right to claim that her DNFSB testimony during a closed hearing is
23 confidential given that she saved the transcript to her employer's
24 server and did not take steps to preserve its confidentiality.
25 Further, Mrs. Busche waived the confidential nature of her closed-
26 DNFSB-hearing testimony by placing this testimony at issue in this
lawsuit. See Complaint, ECF No. 1 ¶ 2.44 ("In the Busche closed
hearing testimony, Busche testified that she was next in line for
removal from the WTP after Dr. Tamosaitis, because of her refusal to

1 yield to technically unsound positions on matters affecting safety
2 advanced by DOE, URS, and BNI."). For these reasons, the Court finds
3 Mrs. Busche must produce her testimony during the at-issue closed-
4 DNFSB hearing(s).

5 In addition, the Court determines Mrs. Busche must produce her
6 correspondence with members of/counsel for DNFSB. The confidentiality
7 provided to closed-DNFSB-hearing testimony by 10 C.F.R. § 1704.5 does
8 not extend to communications to DNFSB members or staff.² Accordingly,
9 Mrs. Busche must respond to URS RFP No. 8. Her motion for protective
10 order is denied in this regard.

11 As to the last general category, the Court denies Mrs. Busche's
12 request for a protective order as to URS RFP No. 6, and BNI
13 Interrogatory No. 1 and RFP Nos. 1 and 13.³ These requests seek
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16 ² Assistant United States Attorney Pamela DeRusha participated
17 telephonically in the hearing. Ms. DeRusha advised that DNFSB
18 does not consider § 1704.5's confidentiality provisions to apply
19 to communications outside of closed-DNFSB hearings.

20 ³ These discovery requests state:

21 **[BNI] INTERROGATORY NO. 1:** With respect to your allegation
22 in paragraph 3.2 of the Complaint that "Plaintiff states a
23 claim against . . . BNI for violation of the whistleblower
24 provisions of the ERA, Section 211 of the Energy Act [sic]
25 of 1974, as amended, 42 U.S.C. § 5851," please identify as
26 follows:

- a. All alleged adverse employment actions, acts of retaliation, and/or unlawful actions by BNI that comprise this claim;
- b. All facts on which these allegations and this claim are based; and
- c. All individuals with knowledge of these facts.

1 information relevant to the claims asserted by Mrs. Busche in this
2 lawsuit. They are not overbroad, and Mrs. Busche failed to identify
3 how they are unduly burdensome. If Mrs. Busche is concerned that
4 these requests seek privileged or otherwise protected information or
5 documents, she is to set such forth in a privilege log or otherwise
6 seek relief from this Court.

7 In summary, the Court denies as moot in part and denies in part
8 Mrs. Busche's motion for protective order.

9 **E. Conclusion**

10 For the above-given reasons, **IT IS HEREBY ORDERED:**

11 1. Mrs. Busche's Motion to Stay, **ECF No. 44**, is **GRANTED IN**
12 **PART and DENIED IN PART.**

13 2. This lawsuit is **STAYED** until **May 1, 2014**. On **May 1, 2014**,
14 Mrs. Busche shall file a notice advising the Court as to
15 the status of the DOL proceeding and any other matters
16 relevant to this lawsuit.

17 3. Mrs. Busche's Motion for Protective Order Regarding
18 Defendants' First Interrogatories and Requests for
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20 **[BNI] REQUEST FOR PRODUCTION NO. 1:** Please produce all
21 documents relating to the claim described in Interrogatory
22 No. 1 above, including all documents relating to your
answer to Interrogatory No. 1 above.

23 **[BNI] REQUEST FOR PRODUCTION NO. 13:** Please produce all
24 written and/or electronic communications between Plaintiff
25 and any other individual(s) (excluding Plaintiff's legal
counsel) regarding Plaintiff's claim in this lawsuit and/or
the facts relating to Plaintiff's claim in this lawsuit.

1 Production to Plaintiff, **ECF No. 25**, is **DENIED IN PART** (URS
2 RFP Nos. 6 & 8; and BNI Interrogatory No. 1 and RFP Nos. 1
3 and 13) and **DENIED AS MOOT IN PART** (remainder).

4 4. Defendants' Joint Motion to Strike Jury Demand, **ECF No. 28**,
5 and Defendants' motions to dismiss, **ECF Nos. 33 & 35**, are
6 **TERMED** at this time.

7 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
8 Order and provide copies to all counsel.

9 **DATED** this 21st day of February 2014

10 s/Edward F. Shea

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EDWARD F. SHEA

12 Senior United States District Judge
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