

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

|  |   |                          |
|--|---|--------------------------|
| MARK HOHIDER and ROBERT DIPAULO,       | ) |                          |
| On Behalf of Themselves and All Others | ) |                          |
| Similarly Situated,                    | ) |                          |
|  | ) |                          |
| Plaintiffs,                            | ) |                          |
|  | ) | Civil Action No. 04-0363 |
| v.                                     | ) |                          |
|  | ) |                          |
| UNITED PARCEL SERVICE, INC., and       | ) | Judge Joy Flowers Conti  |
| DOES 1-100,                            | ) |                          |
|  | ) |                          |
| Defendants.                            | ) | <b>Electronic Filing</b> |

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|-------------------------------------|---|
| PRESTON EUGENE BRANUM,              | ) |
| On Behalf of Himself and All Others | ) |
| Similarly Situated,                 | ) |
|                                     | ) |
| Plaintiffs,                         | ) |
|                                     | ) |
| v.                                  | ) |
|                                     | ) |
| UNITED PARCEL SERVICE, INC., and    | ) |
| DOES 1-100,                         | ) |
|                                     | ) |
| Defendants.                         | ) |

**DEFENDANT UNITED PARCEL SERVICE, INC.’S SUBMISSION REGARDING THE  
THIRD CIRCUIT’S ORDER STAYING ALL PROCEEDINGS IN THIS COURT**

**I. INTRODUCTION**

On February 8, 2008, the Third Circuit Court of Appeals issued an Order granting UPS’s Motion to Stay all proceedings in this Court, including discovery, pending the Third Circuit’s review of this Court’s July 16, 2007 Class Certification Order. Later that same day, this Court issued an Order directing the parties to “meet and confer” about the effect of the Third Circuit’s decision on the Special Master’s review of Plaintiffs’ pending Motion for Sanctions. Although the parties conferred via telephone conference on February 12, 2008, as

directed, they did not agree on the effect of the Third Circuit's Order on the investigation by the Special Master. Accordingly, as directed by this Court in its February 8, 2008 Order, UPS makes the following submission in support of its position that the Third Circuit's Order granting the Company's Motion to Stay mandates a stay of all proceedings in this Court, including all activities by the Special Master.

## II. PROCEDURAL HISTORY

On December 14, 2007, UPS filed its Motion for Stay Pending Appeal ("Motion to Stay") in the Third Circuit Court of Appeals. (*See* UPS's Mot. for Stay, filed in Third Circuit Docket No. 07-4588, attached hereto as Exhibit A.) As the Motion to Stay made clear, UPS sought a stay of "all proceedings in the district court, including discovery, pending resolution of UPS's appeal from the order certifying the largest class action in the history of the Americans with Disabilities Act of 1990." (*Id.* at 1.)

Plaintiffs-Appellees' Opposition to Motion to Stay Pending Appeal ("Opposition") was filed on January 10, 2008. (*See* Plaintiffs-Appellees' Opposition, filed in Third Circuit Docket No. 07-4588, attached hereto as Exhibit B.) In their Opposition, Plaintiffs acknowledged their understanding that UPS sought "to stay all proceedings in the District Court, including discovery, pending a final resolution of UPS's interlocutory appeal of the District Court's class certification decision." (*Id.* at 1.) Significantly, Plaintiffs apprised the Third Circuit that they had filed a motion for sanctions and for a preservation order in this Court, that those motions were based on their concern regarding UPS's alleged spoliation of evidence, and that this Court had appointed a Special Master to investigate those matters:

Also raised by the District Court on November 6, 2007, was Plaintiffs' pending motion for sanctions and for the

preservation of evidence brought as a result of UPS's failure to issue a timely and effective litigation hold in this case, thereby allowing the continued, systematic deletion of emails every fourteen days, causing the destruction, perhaps irretrievable, of critical evidence. The District Court indicated it was 'really troubled' and appointed a Special Master to investigate UPS's data systems and to issue a report and recommendation on Plaintiffs' motion. (Ex. B at 51-58) Among other reasons, UPS's tardy motion for a stay should be denied because a stay would threaten the continued destruction of critical evidence.

(Plaintiffs-Appellees' Opposition at 6.) (*See also id.* at 19-20) ("If this Court were to stay all proceedings in the District Court, critical evidence could continue to be destroyed, compromising the opportunity for a fair trial.").

On February 8, 2008, the Third Circuit Court of Appeals issued its Order granting UPS's Motion to Stay in its entirety, stating that "**The foregoing motion for stay is hereby GRANTED.**" (February 8, 2008 Order, entered in Third Circuit Docket No. 07-4588, attached hereto as Exhibit C) (emphasis in original). Nowhere in the Third Circuit's Order is there any statement or suggestion that the Order permits any proceedings to continue in the District Court, including any activities involving the Special Master.

### III. DISCUSSION

Despite the plain language of UPS's request for a stay of "all proceedings" and the Third Circuit's granting of the Motion to Stay in its entirety, Plaintiffs took the position during the parties' February 12, 2008 telephone conference that the Third Circuit's Order does not stay the activities of the Special Master. In support of this puzzling argument, Plaintiffs pointed to a single sentence in UPS's Reply in Support of Motion for Stay Pending Appeal ("Reply"), which states that "[i]n fact, plaintiffs admit that the district court has

already taken measures to preserve the very evidence they now claim is at risk,” (UPS’s Reply, filed in Third Circuit Docket No. 07-4588, attached hereto as Exhibit D, at 10), and argued that that sentence constituted a concession by UPS that the scope of its Motion to Stay somehow excluded the Special Master’s activities. Plaintiffs argument in this regard is completely without merit and should be rejected for at least three reasons.

First, Plaintiffs’ argument is patently inconsistent with the plain language of the Third Circuit’s Order, which granted UPS’s Motion to Stay without any exception. In this regard, it is significant that Plaintiffs tried to convince the Third Circuit to deny the Motion to Stay by highlighting their concerns about the alleged spoliation of evidence as well as the fact that this Court had appointed a Special Master to look into those concerns. (Plaintiffs-Appellees’ Opposition at 6, 19-20.) Being well aware of Plaintiffs’ concerns and the activities of the Special Master, if the Third Circuit had intended to limit the stay in any way or to permit the Special Master to continue his consideration of Plaintiffs’ Motion for Sanctions, then it would have limited its Order accordingly. Because the Third Circuit did not limit its Order in that fashion, Plaintiffs’ attempt to rewrite the circuit court’s order to their liking is disingenuous and should be rejected.

Second, Plaintiffs’ argument is inconsistent with their own representations and the position that they took in the Opposition that they filed in the Third Circuit. Indeed, in their Opposition, Plaintiffs acknowledged that UPS sought a stay of “all proceedings in the District Court, including discovery, pending a final resolution of UPS’s interlocutory appeal of the District Court’s class certification decision.” (Plaintiffs-Appellees’ Opposition at 1) (emphasis added). Nowhere in their Opposition do Plaintiffs state or even suggest that the

Third Circuit should limit its stay to only those matters not related to the Special Master's investigation.

Third, Plaintiffs' argument is not supported by the single sentence in UPS's Reply that they contend somehow limits the scope of the Third Circuit's Order. To the contrary, the sentence cited by Plaintiffs is nothing more than UPS's characterization of Plaintiffs' own position asserted in their Opposition. (UPS's Reply at [cite to UPS's Reply at 10] Moreover, there is no way that UPS's statement that, "[i]n fact, plaintiffs admit that the district court has already taken measures to preserve the very evidence they now claim is at risk," can possibly be read to constitute a concession that the Company's Motion to Stay should be limited to exclude the Special Master's activities, especially in light of the very clear positions of the parties discussed above. Finally, Plaintiffs' argument conveniently ignores the context in which the subject sentence is contained. The sentence that immediately precedes the subject sentence makes clear that Plaintiffs' concerns about the "continued destruction of critical evidence" are unfounded because such concerns are based upon nothing more than Plaintiffs' own allegations, and the sentence that immediately follows the subject sentence states that "[i]n any event, the law provides ample disincentive and recourse for the destruction of evidence regardless of whether the case is stayed." (UPS's Reply at 9-10.) Thus, it is readily apparent that UPS was simply making the point in this paragraph that Plaintiffs' concerns about the alleged spoliation of evidence were well known to this Court and that there were sufficient ways to address those concerns even after the conclusion of a stay. Indeed, if it was UPS's position that the Special Master's activities should continue during any stay, then there would have been no reason to include the final sentence at all.

IV. CONCLUSION

In conclusion, it is beyond dispute that UPS moved the Third Circuit for a stay of all proceedings in this Court pending the outcome of the appeal. The Third Circuit granted that Motion to Stay in its entirety and, despite having been apprised of the Special Master's activities by Plaintiffs, the Third Circuit did not suggest in any way that such activities should be excepted from the stay. Accordingly, consistent with the Third Circuit's directive, this Court should stay all proceedings immediately. If Plaintiffs feel that there is some need for clarification of the Third Circuit's Order, then that request should be made to the Third Circuit, not this Court.

Respectfully submitted this 12th day of February, 2008.

/s R. Steve Ensor

R. Steve Ensor (admitted *pro hac vice*)  
steve.ensor@alston.com

Glenn G. Patton (admitted *pro hac vice*)  
glenn.patton@alston.com

Charles A. Gartland II (admitted *pro hac vice*)  
chuck.gartland@alston.com

Leslie E. Wood (admitted *pro hac vice*)  
leslie.wood@alston.com

ALSTON & BIRD LLP  
1201 West Peachtree Street  
Atlanta, GA 30309  
Tel. 404-881-7000  
Fax. 404-881-7777

David J. McAllister PA ID No. 36729  
dmcallister@reedsmith.com

Perry A. Napolitano PA ID No. 56789  
pnapolitano@reedsmith.com

Joseph E. Culleiton PA ID No. 82823  
jculleiton@reedsmith.com

REED SMITH LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
Tel. 412-288-7216  
Fax. 412-288-3063

ATTORNEYS FOR DEFENDANT UNITED  
PARCEL SERVICE, INC.