

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**RONALD J. SMOLOW,**  
**Individually and on behalf of all persons**  
**and entities similarly situated,**

**Plaintiff,**

v.

**BARBARA HAFER,**  
**Treasurer of the Commonwealth of**  
**Pennsylvania,**

**Defendant.**

**CIVIL ACTION  
NO. 04-941**

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**ORDER AND MEMORANDUM**

**ORDER**

AND NOW, this 8<sup>th</sup> day of June, 2005, upon consideration of Plaintiff's Motion to Vacate Stay (Doc. No. 23, filed March 14, 2005), Defendant's Response to Plaintiff's Motion to Vacate Stay (Doc. No. 27, filed April 8, 2005), Defendant's Supplemental Motion to Dismiss (Doc. No. 28, filed April 8, 2005), Plaintiff Ronald J. Smolow's Reply in Support of Motion to Vacate Stay (Doc. No. 30, filed April 26, 2005), Plaintiff Ronald J. Smolow's Brief in Opposition to Defendant's Supplemental Motion to Dismiss the Amended Complaint (Doc. No. 31, filed April 26, 2005), Plaintiff's Memorandum of Law Submitted Pursuant to Court Order Dated May 6, 2005 (Doc. No. 33, filed May 18, 2005), Defendant's Memorandum of Law Submitted Pursuant to Court Order Dated May 6, 2005 (Doc. No. 34, filed May 27, 2005), and the related submissions of the parties, for the reasons set forth in the attached Memorandum, **IT IS**

**ORDERED** as follows:

1. Plaintiff's Motion to Vacate Stay is **GRANTED**; and

2. Defendant's Supplemental Motion to Dismiss is **DENIED** .

**IT IS FURTHER ORDERED** that a Scheduling Conference will be conducted in due course.

### MEMORANDUM

#### **I. INTRODUCTION**

Plaintiff, Ronald J. Smolow, filed this class action on May 3, 2004, against Barbara Hafer, Treasurer of the Commonwealth of Pennsylvania, for failing to pay him interest allegedly earned upon his property confiscated pursuant to the Disposition of Abandoned and Unclaimed Property Act ("DAUPA"), 72 Pa C.S. §1301.1 et seq.<sup>1</sup> In his Amended Class Action Complaint, filed May 11, 2004, plaintiff alleged violation of the DAUPA, state common law and constitutional claims. He also alleged federal constitutional claims for unlawful taking without just compensation and violation of his substantive and procedural due process rights. On May 8, 2004, plaintiff filed a class action in the Commonwealth Court of Pennsylvania alleging almost identical state and federal law claims.

On January 24, 2005, this Court issued a Memorandum and Order granting defendant's Motion to Dismiss plaintiff's state law claims and request for restitution, and denying the Motion with respect to plaintiff's federal constitutional claims and request for prospective relief. In so ruling, the Court abstained from further adjudication of plaintiff's remaining federal claims and stayed all further proceedings pursuant to the doctrine announced in R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), "pending a determination in the courts of the Commonwealth

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<sup>1</sup> A more detailed factual and procedural history of this case can be found in the Court's January 24, 2005 Memorandum and Order ruling on defendant's motion to dismiss. See Smolow v. Hafer, 353 F. Supp.2d 561 (E.D. Pa. 2005).

of Pennsylvania as to whether the DAUPA, 72 Pa. C.S. 1301.01 et seq., requires the payment of interest earned upon property confiscated pursuant to that Act.” (Order dated Jan. 24, 2005 ¶5). In the January 24, 2005 Order the Court provided that, “[p]laintiff may move to vacate this stay in the event that (a) the state court rules on the question whether the DAUPA requires payment of interest; or (b) the state court dismisses plaintiff’s state claims without resolution of this question and plaintiff demonstrates he has exhausted his ability to have this question adjudicated in state court.” Id. The Court also ruled in the January 24, 2005 Memorandum that plaintiff could reserve his federal law claims, pursuant to the procedure announced in England v. Louisiana State Bd. of Med. Exam’rs, 375 U.S. 411 (1964), by disclosing his federal claims and this reservation to the state court. Smolow, 353 F. Supp. 2d at 575.

Subsequently, on February 9, 2005, the Commonwealth Court sustained defendant’s preliminary objections and dismissed plaintiff’s action in state court, holding, *inter alia*, that the DAUPA did not require the Treasury to pay interest on confiscated property. Smolow v. Hafer, 867 A.2d 767, 776 (Pa. Commw. Ct. 2005). The court also ruled that plaintiff had abandoned his property and, citing federal authority, stated that “no unconstitutional taking occurs where a state exercises its right to take custody and control of abandoned property.” Id. at 774.

On March 9, 2005, plaintiff filed a Notice of Appeal of the Commonwealth Court decision in the Pennsylvania Supreme Court. (Mot. Vacate, Ex. 2). In the Notice of Appeal, plaintiff stated that he did not seek review of the Commonwealth Court’s holding that the DAUPA does not require payment of interest, the issue underlying this Court’s decision to abstain and stay proceedings in this case, and he reserved his federal law claims under England. (Id.).

Presently before the Court is plaintiff's Motion to Vacate Stay and Defendant's Response and Supplemental Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court addresses each of these Motions in turn.

## **II. PLAINTIFF'S MOTION TO VACATE STAY**

In his Motion to Vacate Stay, plaintiff avers that he disclosed his federal claims to the Commonwealth Court and reserved them pursuant to England. The Court notes that plaintiff's Amended Complaint filed in the Commonwealth Court states that, "Plaintiff asserts the federal claims set forth herein to reserve those claims under [England]." (Commw. Ct. Am. Compl. ¶ 6). Although not artfully stated, plaintiff contends, and the Court agrees, that such language constituted a reservation of his federal claims under England. Plaintiff repeated this reservation in his Notice of Appeal and stated in the Notice that "Plaintiff does not appeal that part of the Opinion and Order holding that the [DAUPA] does not require the payment of interest," the issue underlying the Court's decision to abstain from adjudication of plaintiff's federal claims. (Mot. Vacate, Ex.2).

Defendant, in her Response, argues that this Court should continue its Pullman stay because one of the issues presented on appeal—the Commonwealth Court's ruling on the takings provision of the state constitution—raises an uncertain issue of state law which, when resolved, could obviate the need for, or substantially narrow the scope of, this Court's ruling. This argument is rejected.

In its Memorandum and Order dated January 24, 2005, the Court stated that it "does not specifically invoke the existence of state constitutional claims as a grounds for abstention" because the state constitutional provision at issue merely parallels the language of the Takings

Clause of the U.S. Constitution. Smolow, 353 F.Supp. 2d at 574 n.5 (citing Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 238 n.4 (1984) (“[A]bstention is not required for interpretation of parallel state constitutional provisions”); ACS Enters., Inc. v. Comcast Cablevision of Philadelphia, L.P., 1994 WL 185046 at \*9 n.4 (E.D. Pa. 1994) (“Abstention cannot be based on the ground that, prior to the federal court's determination of federal constitutional claims, a state court should consider the validity of a state statute under a state law restriction that simply parallels the federal restriction on which a plaintiff relies.”)). This Court cannot predict how the Pennsylvania Supreme Court will rule on the takings issue. As defendant argues, it is entirely possible that the Supreme Court decision on that issue could narrow and possibly eliminate the need for this Court to adjudicate plaintiff’s federal claims. However, the state takings clause at issue merely mirrors the language of the Takings Clause of the U.S. Constitution which is presented to this Court for decision. Therefore the pendency of the appeal does not provide a basis for abstention and a continuation of the stay. To the extent the Commonwealth Court relied upon federal constitutional law in holding that no taking occurred, this Court will give no weight to that part of the ruling. See Wright & Miller § 4243 (noting that if plaintiff makes a proper England reservation, “the state court ought not decide the federal claims, and if it does the federal court need give no weight to the state decision of them”). See also Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813, 820-21 (3<sup>rd</sup> Cir. 1994).

Because the Commonwealth Court ruled on the construction of the DAUPA, the basis of this Court’s decision to abstain, which plaintiff did not appeal, and plaintiff properly reserved his federal claims under England, the Court vacates the stay imposed by Order dated January 24,

2005.<sup>2</sup>

### III. DEFENDANT’S SUPPLEMENTAL MOTION TO DISMISS

#### A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a claim for failure to state a claim upon which relief can be granted. Under this rule, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). “For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted.” Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

#### B. Discussion

In her Supplemental Motion to Dismiss, defendant argues that the Commonwealth Court’s ruling that there was no taking under the Pennsylvania Constitution provides an additional ground for dismissal of plaintiff’s Complaint in this Court—that he abandoned his property and therefore, based on Texaco, Inc. v. Short, 454 U.S. 516 (1982), he does not state a claim under the Takings Clause of the U.S. Constitution. In Texaco, the Court considered a state

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<sup>2</sup> The Court concludes that plaintiff was not required to appeal the ruling of the Commonwealth Court that the DAUPA did not require the payment of interest before requesting that this Court vacate its stay. Under the Pullman doctrine, a court may exercise discretion when determining whether a state law is uncertain. See Pullman, 312 U.S. at 501 (noting that abstention involves the exercise of “wise discretion”); Georgevich v. Strauss, 772 F.2d 1078, 1091 (3d Cir. 1985) (“Pullman abstention is not jurisdictional, but discretionary.”). In exercising this discretion, the Court concludes that the Commonwealth Court has clarified the issue of state law underlying this case, and that abstention by this Court is no longer warranted. See McFall v. Register of Will of Bucks County, 352 F. Supp. 2d 544, 547, n.1 (E.D. Pa. 2004) (Brody, J.) (stating that Pullman abstention not warranted where Pennsylvania Court of Common Pleas adjudicated the underlying issue of state law during concurrent proceedings). Cf. Georgevich, 772 F.2d at 1091 (“[B]y requiring abstention we are not reintroducing an exhaustion requirement by another name.”).

statute providing, “that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property.” Id. at 518. The Supreme Court held the state may treat such property as abandoned, and that, “it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner’s failure to make any use of the property--and not the action of the State--that causes the lapse of the property right; there is no ‘taking’ that requires compensation.” Id. at 530.

In his Brief in Opposition, plaintiff argues that Texaco is inapplicable to this case because, *inter alia*, he does not claim that the defendant engaged in a taking requiring just compensation when she assumed custody of his property. Instead, plaintiff asserts that defendant engaged in a taking without just compensation only when she returned the proceeds of the stock sale but retained the interest on the proceeds. (Pl. Opp. at 7-8); (Mot. Vacate at 3). Plaintiff argues that, unlike the appellants in Texaco, he retained ownership of his property after the state assumed custody of it pursuant to the DAUPA, and thus had ownership of any interest earned upon that property. In so arguing, he relies on the Supreme Court decision in Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003), and related authority addressing the state’s use of client funds held in “interest on lawyer’s trust accounts” (“IOLTA’s”).

In Brown, petitioners challenged a state law requiring lawyers to deposit their clients’ funds into IOLTA’s and directing the banks holding these funds to transfer interest earned on the funds to a state legal foundation. Petitioners argued that this law violated the Takings and Just Compensation Clauses of the U.S. Constitution. In its opinion, the Brown court stated that “the interest earned in the IOLTA accounts ‘is the private property of the owner of the principal.’” Id. at 235 (quoting Phillips v. Washington Legal Foundation, 524 U.S. 156, 172 (1998)). However,

the Court went on to rule that transferring this interest to different owners for public use did not constitute a taking without just compensation where petitioners did not suffer a “net loss” as a result—i.e., where the cost of returning interest to owners exceeded the value of the interest earned. Id. at 240.

This Court concludes that defendant’s Supplemental Motion to Dismiss, and reliance on Texaco, fails to address plaintiff’s claim, and supporting authority, that a taking without just compensation resulted only when defendant failed to pay him interest earned upon his confiscated property. In so ruling, the Court notes that defendant, in her previous Motion to Dismiss, argued that plaintiff failed to state a takings claim under Brown because he failed to aver he suffered a net loss. The Court denied that part of defendant’s Motion in the January 24, 2005 Memorandum and Order, ruling that “further factual development is required to determine whether the plaintiff in this matter suffered a net loss; it will not read Brown to require dismissal for plaintiff’s failure to expressly aver deprivation of a net gain in his Amended Complaint.” Smolow, 353 F. Supp. 2d at 571. Accordingly, the Court concludes that, accepting all of the factual allegations in the Amended Complaint as true, the question of whether plaintiff suffered a taking without just compensation as a result of defendant’s failure to pay him interest requires further development of the record. Defendant’s Supplemental Motion to Dismiss is denied on that ground.



**IV. CONCLUSION**

For all of the foregoing reasons, the Court grants plaintiff's Motion to Vacate Stay and denies defendant's Supplemental Motion to Dismiss.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**