IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK,
MIKE HOWARD, and
MATTHEW BROUGH,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS AND TO VACATION SCHEDULING ORDER

Defendants Matthew Chernak, Mike Howard and Matthew Brough, by and through their counsel, Thomas J. Lyons, Esq., and Christina S. Gunn, Esq., of Hall & Evans, L.L.C., hereby respectfully submit this Reply in Support of their Motion to Stay Proceedings and to Vacate Scheduling Conference, as follows:

INTRODUCTION

The law is clear qualified immunity determinations must be made at the earliest possible stage of litigation, including at the pleading stage. Because qualified immunity is immunity from suit, a defendant asserting the defense should not be required to undergo the burdens of litigation, including the discovery process or any other pretrial proceedings, when the qualified immunity issue can be resolved as a matter of law. Indeed, the Supreme Court of the United States has made clear when an individual

defendant raises an immunity defense ***all*** discovery should be stayed. Accordingly, Defendants respectfully request this Court stay all further proceedings in this matter until this Court determines their qualified immunity.

ARGUMENT

Plaintiff argues Defendants' Motion to Stay lacks substantial justification, an assertion which flies in the face of established Supreme Court precedent. The Supreme Court addressed the propriety of staying proceedings when qualified immunity is at stake in the landmark case of ***Ashcroft v. Iqbal***, 556 U.S. 662 (2009). ***Iqbal***, of course, concerned the appropriate pleading standard for stating a claim, but the Supreme Court's discussion of the concomitant issue of whether discovery should be permitted to bolster a claim is instructive.

Iqbal addressed the prospect of permitting discovery when a qualified immunity defense has been raised. In ***Iqbal*****,** the Court of Appeals had "instructed the district court to cabin discovery in such a way as to preserve [Ashcroft's] defense of qualified immunity as much as possible in anticipation of a summary judgment motion." ***Id.*** at 684. The Supreme Court rejected the Court of Appeals' so-called "careful-case-management approach," finding the question presented by a motion to dismiss a complaint for failure to state a claim "does not turn on the controls placed upon the discovery process." ***Id.*** at 684-5. Significantly, the Supreme Court found the rejection of the careful-case-management approach was "especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity." ***Id.*** at 685. The Court

reiterated qualified immunity "free[s] officials from the concerns of litigation, including avoidance of disruptive discovery." ***Id.***

As an indication of how imperative it is that potentially immune defendants not be required to participate in discovery, the Court further rejected the idea that pretrial proceedings should continue even against other defendants who are not claiming immunity. ***Id.*** at 685-86. The Court found, "Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery. We decline the respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery." ***Id.***

Under ***Iqbal,*** a complete stay of discovery of claims against defendants both subject to and not subject to an immunity defense is appropriate and is regularly ordered by the federal courts. *See, e.g.,* ***Martinez v. Carson,*** 697 F.3d 1252, 1256-57 (10th Cir. 2012) (describing propriety of a complete stay of discovery when some defendants raise qualified immunity on summary judgment pursuant to ***Iqbal***); ***Chapman v. Fed. Bureau of Prisons,*** 15-cv-0279-WYD-KLM, 2015 U.S. Dist. LEXIS 99648 at *8-10 (D. Colo. July 30, 2015) (entering complete stay of discovery despite immunity defenses only applying to some defendants and some claims); ***Drive Sunshine Inst. v. High Performance Transp.,*** 14-cv-00844-REB-KMT, 2014 U.S. Dist. LEXIS 158723 at *9 (D. Colo. Nov. 10, 2014) ("Additionally, discovery should be stayed in the case as a whole even though only some of the defendants are asserting qualified immunity as a defense."); ***A.A. v. Martinez,*** 12-cv-00732-WYD-KMT, 2012 U.S. Dist. LEXIS 174813 at *3-4 (D. Colo. Oct. 9, 2012) ("While the above statements are dicta, they very clearly indicate that the

Supreme Court believes discovery should be stayed as a whole even when only one defendant is asserting qualified immunity."); ***Geschwenter v. City of Englewood,*** 11-cv-02089-WJM-MJW, 2011 U.S. Dist. LEXIS 133128 at *2-4 (D. Colo. Nov. 17, 2011) (staying all discovery and vacating scheduling conference based on some but not all defendants filing a motion to dismiss on Eleventh Amendment sovereign immunity grounds); ***Eggert v. Chaffee County,*** 10-cv-01320-CMA-KMT, 2010 U.S. Dist. LEXIS 95245 at *14 (D. Colo. Aug. 25, 2010) ("The court finds that a stay of all proceedings is appropriate in this case to protect the defendants who have asserted immunity defenses from the burdens of litigation.").

It follows then that, if a complete stay of discovery is warranted when some defendants have not asserted qualified immunity while others have, a case such as this where *all* of the defendants seek qualified immunity on *each* claim for relief requires a discovery stay. Indeed, this Court has held it "is obligated to 'exercise its discretion so that officials [properly asserting qualified immunity] are not subjected to unnecessary and burdensome discovery or trial proceedings.'" ***Doe v. Woodard,*** 15-cv-01165-KLM, 2015 U.S. Dist. LEXIS 123616 at *5 (D. Colo. Sept. 16, 2015) (quoting ***Crawford-El v. Britton,*** 523 U.S. 574, 597-98 (1998) (alteration in original)); ***see also Thompson v. McCullar***, No. 08-cv-2000-REB-KLM, 2009 U.S. Dist. LEXIS 22688 (D. Colo. March 11, 2009).

In his Response, Plaintiff relies almost exclusively on pre-***Iqbal*** cases. Other courts have noted ***Iqbal*** represents a significant change in the law requiring discovery be stayed pending a qualified immunity determination. *See, e.g.,* ***King v. Benford,*** Civil No. 10-828 JH/LFG, 2010 U.S. Dist. LEXIS 147752 at *6-7 (D.N.M. Dec. 7, 2010); ***Tenorio***

v. Pitzer, Civ 12-1295 MCA/KBM, 2013 U.S. Dist. LEXIS 197828 at *7-8 (D.N.M. July 27, 2013) ("***Rome*** and ***Vaughn***, however, were both non-binding pre-***Iqbal*** decisions, and neither dictates denying the requested stay here. Before ***Iqbal***, it was somewhat unsettled among courts whether and under what circumstances discovery should be stayed on the basis of a qualified immunity assertion."). In short, to ignore ***Iqbal*** in favor of cases that pre-date it is to ignore the current state of the law on this issue.

Further, the post-***Iqbal*** cases Plaintiff relies on are of no moment since all but one of them did not involve qualified immunity. The one case that did, ***Paulsen v. Anderson***, Civil Action No. 15-cv-00800-PAB-KMT, 2015 U.S. Dist. LEXIS 136933, at *3 (D. Colo. Oct. 6, 2015), resulted in a stay. Indeed, the Court found that "[p]ermitting discovery to move forward against these Defendants in this context would be a heavy burden on them—one the doctrine of qualified immunity was created, in part, to avoid." ***Id.*** at *4.

Plaintiff attempts to get around the great weight of authority mandating a stay when qualified immunity has been asserted by arguing qualified immunity does not apply. Without relitigating the Motion to Dismiss, it is important to note that the Supreme Court is again not on Plaintiff's side. It is well-settled qualified immunity provides immunity from suit rather than a mere defense to liability**.** ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985). Thus, the Supreme Court has held it should be resolved at the earliest possible stage of litigation, including the pleading stage. ***Hunter v. Bryant,*** 502 U.S. 224, 227 (1991) (per curiam) (collecting cases). Defendants, therefore, are entitled to a ruling on the issue of their qualified immunity before this matter proceeds any further.

Finally, any burden on the Plaintiff caused by the delay required for the Court to make its qualified immunity determination is outweighed by the burden on the Defendants. This Court's holding in ***Thompson v. McCullar***, Civil Action No. 08-cv-02000-REB-KLM, 2009 U.S. Dist. LEXIS 22688, at *3-4 (D. Colo. Mar. 11, 2009) demonstrates the necessity of the stay. Before the Court in ***Thompson*** was a Motion to Stay Pending Resolution of Qualified Immunity in a case where the defendants had filed a Motion to Dismiss on the basis of qualified immunity. In granting the stay, the Court found as follows:

> In weighing the factors set forth for determining the propriety of a stay, the Court finds that a stay is appropriate here. *See String Cheese,* 2006 U.S. Dist. LEXIS 97388, 2006 WL 894955, at *2. The Court must first balance Plaintiff's desire to proceed expeditiously with his case against the burden on Defendants of going forward. *Id.* There can be no doubt that Plaintiff has an interest in proceeding expeditiously, but this interest is offset by Defendants' burden. Here, Defendants have filed a Motion to Dismiss [Docket No. 20] the claims against them, in part, on the grounds of qualified immunity. Courts have routinely held that discovery should be stayed while issues of immunity are being resolved. *See generally Siegert v. Gilley,* 500 U.S. 226, 231, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); [*4] *Weise v. Casper,* 507 F.3d 1260, 1263-64 (10th Cir. 2007); *Workman v. Jordan,* 958 F.2d 332, 336 (10th Cir. 1992); *see also Behrens v. Pelletier,* 516 U.S. 299, 308, 116 S. Ct. 834, 133 L. Ed. 2d 773 & 310 (1996) (noting that discovery can be particularly disruptive when a dispositive motion regarding immunity is pending). **On balance, the Court finds the potential harm to Plaintiff of a stay is outweighed by the burden on Defendants resulting from conducting and responding to discovery while the Motion to Dismiss is pending**.

Thompson, 2009 U.S. Dist. LEXIS 22688, at *3-4 (D. Colo. Mar. 11, 2009) (emphasis added).

There is simply no question that Defendants' qualified immunity must be determined before undertaking the burdens of litigation. To find otherwise, would be to

deny Defendants one of the essential protections of the qualified immunity defense. Accordingly, the Motion to Stay must be granted.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants Matthew Chernak, Mike Howard and Matthew Brough, respectfully request their Motion to Stay be granted and that this matter be stayed pending a determination of their qualified immunity.

Dated this 24th day of July, 2018.

Respectfully submitted,

s/ *Christina S. Gunn*
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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 24th day of July, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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