IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER, in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDINGS [DOC. #35]

Plaintiff, by and through undersigned counsel, hereby submits this Response to State Defendants' Motion To Stay Proceedings, [Doc. #35], and states in support as follows:

1. **INTRODUCTION**

On the night of April 6, 2017, Plaintiff Michaella Surat was with her boyfriend, Mitchell Waltz, at the Bondi Beach Bar in Fort Collins celebrating her twenty-second birthday. After police officers were called regarding an altercation inside Bondi's involving Waltz, he was asked to leave. Fort Collins Police Officers Randall Klamser and Garrett Pastor arrived at the bar and spoke with a bouncer outside about what happened. Ms. Surat walked past Defendant Officer Klamser toward Waltz, only to be stopped by Officer Klamser who was seeking to question Waltz, and who told Ms. Surat to "back off." Officer Klamser then grabbed Ms. Surat by her wrist and placed her in a rear wristlock hold. Still holding Ms. Surat by the wrist, Officer Klamser violently threw Ms. Surat face-first to the ground. Ms. Surat's chin slammed into the sidewalk, causing cervical strain, a concussion, and a large and painful contusion on her chin that

later turned purple and black. She also sustained painful bruising on her arms, wrists, knees, and legs. The use of force by Officer Klamser against Ms. Surat after she was already under arrest was grossly excessive in violation of the Fourth Amendment to the United States Constitution, and resulted from the deliberately indifferent customs, practices, training, supervision and discipline of the City of Fort Collins.

Defendants seek to deprive Plaintiff of her ability to effectively vindicate her constituional rights before memories fade, witnesses scatter, and documents are lost, and to obtain closure on this difficult chapter of her life by expeditiously gathering the necessary evidence to secure a just and speedy resolution to her case. Because, for the reasons below, Defendants cannot show that any undue burdens in continuing with discovery will outweigh Plaintiff's right to expeditiously proceed in this matter, Defendants have not established that they are entitled to a stay of discovery.

2. **LEGAL STANDARD**

In deciding motions to stay discovery, the underlying principle is that "the right to proceed in court should not be denied except under the most extreme circumstances." *Robert W. Thomas & Anne McDonald Thomas Tr. v. First W. Tr. Bank*, No. 11-cv-0333-WYD-KLM, 2012 U.S. Dist. LEXIS 114092, at *6-7 (D. Colo. Aug. 14, 2012) (quoting *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983)). For this reason, "stays are generally disfavored in this district." *Id.* at *7. While "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket," the movant "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . . will work damage to some one [sic] else." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

The Federal Rules of Civil Procedure do not explicitly provide for a stay of proceedings while a motion to dismiss is pending. *Chavez v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007 U.S. Dist. LEXIS 15054, at *3 (D. Colo. Mar. 2, 2007). Instead, Defendants must show good cause for the issuance of a protective order under Fed. R. Civ. P. 26(c), which requires showing that such an order is necessary to protect them from annoyance, embarrassment, oppression, or undue burden or expense. Defendants cannot sustain their burden "merely by relying upon speculation or conclusory statements," *Breckenridge v. Vargo & Janson, P.C.*, No.16- v-01176-WJM-MEH, 2016 U.S. Dist. LEXIS 168543, at *3 (D. Colo. Nov. 28, 2016), but rather must support their request for a stay with a "particular and specific demonstration of fact." *Pandaw Am., Inc. v. Pandaw Cruises India Pvt. Ltd.*, No. 10-cv-02593-WJM-KLM, 2012 U.S. Dist. LEXIS 704, at *1 (D. Colo. Jan. 4, 2012) (citation omitted). "The movant must show specific facts demonstrating that the challenged discovery will result in a clearly defined and serious injury to the party seeking protection." *Breckenridge*, 2016 U.S. Dist. LEXIS 168543, at *3-4.

3. **ARGUMENT**

3.1 **This Court Should Employ A Modified *String Cheese* Analysis.**[1]

Although Plaintiff is not unaware of any Tenth Circuit case on-point, courts in this District have reflexively applied the test outlined in *String Cheese Incident, LLC v. Stylus Shows, Inc.* (hereinafter "*String Cheese*"), in determining whether to stay discovery. No. 05-cv-0193-LTB-PAC, 2006 U.S. Dist. LEXIS 97388, at *4 (D. Colo. Mar. 30, 2006). The *String Cheese*

[1] Defendants seemingly agree that this Court should employ the modified *String Cheese* analysis advocated here, as they spend nearly the entirety of their briefing focused on the merits of their motion to dismiss and only cursorily discuss the other *String Cheese* factors.

analysis requires the moving party (in this case, Defendants) to establish that the balance of the following five interests tips in their favor: (1) Plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to Plaintiff of a delay; (2) the burden on Defendants in going forward; (3) the convenience to the Court; (4) the interests of persons not parties to this civil litigation; and (5) the public interest. *Id.*, at *4. As described below, the weight of these factors in the present case militates that discovery proceed.

That result is even more apparent when the court includes in its analysis an important consideration that is crucial to determining whether there is "good cause" for a discovery stay under Fed. R. Civ. P. 26(c), but was not addressed in *String Cheese*: likelihood of success of the motion to dismiss. A vast swath of jurisdictions[2] employ this "preliminary peek" approach, and

[2] *See, e.g., Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988); *Feldman*, 176 F.R.D. at 652; *GTE Wireless, Inc. v. Qualcomm, Inc.*, 192 F.R.D. 284, 286 (S.D. Cal. 2000); *Ameris Bank v. Russack*, 2014 U.S. Dist. LEXIS 73460, 2014 WL 2465203 at *1 (S.D. Ga. 2014); *Arriaga-Zacarias v. Lewis Taylor Farms, Inc.*, 2008 U.S. Dist. LEXIS 80216, 2008 WL 4544470 at *1 (M.D. Ga. 2008); *Great W. Cas. Co. v. Firstfleet, Inc.*, No. CA 12-00623-KD-N, 2013 U.S. Dist. LEXIS 92465, at *5 (S.D. Ala. July 2, 2013); *DRK Photo v. McGraw-Hill Cos., Inc.*, No. CV 12-8093-PCT-PGR, 2012 U.S. Dist. LEXIS 168101, at *4 (D. Ariz. Nov. 27, 2012); *Ceglia v. Zuckerberg*, No. 10-CV-569A(F), 2012 U.S. Dist. LEXIS 85633, at *5 (W.D.N.Y. June 20, 2012); *Money v. Health*, No. 3:11-cv-00800-LRH-WGC, 2012 U.S. Dist. LEXIS 49922, at *14-15 (D. Nev. Apr. 9, 2012); *Mlejnecky v. Olympus Imaging America, Inc.*, No. 10-2630 2011 U.S. Dist. LEXIS 16128, 2011 WL 489743 at *6 (E.D. Cal. Feb. 7, 2011); *SP Frederica, LLC v. Glynn Cty.*, No. 2:15-cv-73, 2015 U.S. Dist. LEXIS 119310, at *7 (S.D. Ga. Sep. 8, 2015); *Suarez v. Beard*, No. 15-cv-05756-HSG, 2016 U.S. Dist. LEXIS 161222, at *3 (N.D. Cal. Nov. 21, 2016); *Bennett v. Fastenal Co.*, Civil Action No. 7:15-cv-00543, 2016 U.S. Dist. LEXIS 194431, at *2 (W.D. Va. Mar. 8, 2016); *Barber v. Remington Arms Co.*, No. CV 12-43-BU-DLC, 2012 U.S. Dist. LEXIS 146938, at *2 (D. Mont. Oct. 11, 2012); *United States ex rel. Jacobs v. CDS*, P.A., No. 4:14-cv-00301-BLW, 2015 U.S. Dist. LEXIS 117915, at *4 (D. Idaho Sep. 3, 2015); *Sams v. Ga W. Gate*, LLC, No. CV415-282, 2016 U.S. Dist. LEXIS 75974, at *15 (S.D. Ga. June 10, 2016); *MAO-MSO Recovery II, LLC v. USAA Cas. Ins. Co.*, No. 17-21289-Civ-WILLIAMS/TORRES, 2017 U.S. Dist. LEXIS 205650, at *7 (S.D. Fla. Dec. 14, 2017); *Minton v. Jenkins*, No. 5:10cv61/RH/EMT, 2011 U.S. Dist. LEXIS 55695, at *3 (N.D. Fla. May 24, 2011); *Heinzl v. Cracker Barrel Old Country Store, Inc.*, Civil Action No. 2:14-cv-1455, 2015 U.S. Dist. LEXIS 132958, at *3 (W.D. Pa. Sep. 30, 2015).

this Court should follow these courts in holding that (prior to granting a discovery stay) the court should consider the likelihood of success of the pending motion to dismiss.[3] This determination would be similar to the likelihood of success on the merits approach employed by courts when determining whether to issue a preliminary injunction or temporary restraining order. *See, e.g., Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016).

Explaining the benefits of the preliminary peek approach, when adopted to complement the balancing analysis under *String Cheese*, one scholar provided an example (which is salient to this case) highlighting the benefits of that framework:

> Suppose… that discovery… will be quite extensive, with numerous experts submitting testimony and dozens of witnesses to be deposed, but that most of the material evidence is reflected in hundreds of thousands of documents subject to discovery, with little risk that they will be lost or destroyed. Under a "balancing of factors" approach, the court will now weigh the significant costs and burden associated with discovery against a somewhat greater burden of delay, but still without significant risk of spoliation of evidence. Furthermore, the court can expect multiple discovery disputes to be presided over. Thus, a judge might be expected to stay discovery, finding that before incurring the associated costs and burdens the motion to dismiss should be decided. Under a "preliminary peek" approach, however, the same judge might determine that the motion to dismiss merely quibbles around the edges and that the major claims are very likely to succeed. The only way the entire case could be dismissed is due to a challenge to standing, although standing seems clearly evident in the case. Thus, the judge might decide to allow discovery to proceed, despite its costs and burdens on the parties and the court, because such discovery is unlikely to prove wasteful and any risk is outweighed by the harms associated with delay. The "preliminary peek" approach thus allows judges to refine their balancing in a way that allows them to minimize the risk of unnecessary costs and burdens in any particular case.

Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery*

[3] It is important to note that at least three courts in this District have utilized the preliminary peek framework without naming it as such. *See Waisanen v. Terracon Consultants, Inc.*, Civil Action No. 09-cv-01104-MSK-KMT, 2009 U.S. Dist. LEXIS 123427, at *3 (D. Colo. Dec. 22, 2009); *Sanaah v. Howell*, Civil Action No. 08-cv-02117-REB-KLM, 2009 U.S. Dist. LEXIS 35260, at *2 (D. Colo. Apr. 9, 2009); **Exhibit 1**, *Order Regarding Defendants' Motion To Stay Discovery*, p. 5.

When a Motion to Dismiss is Pending, 47 Wake Forest L. Rev. 71, 88 (2012).[4]

Therefore, Plaintiff asks that this Court to apply a rule that requires courts to "take a preliminary peek at the merits of the allegedly dispositive motion to see if on its face there appears to be an immediate and clear possibility that it will be granted." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997). In doing so, Plaintiff asks that this Court adopt an approach that holds Defendants to their "burden of showing [immediate and clear possibility] and reasonableness." *Id.*[5]

3.2 **As A Matter Of Law, No Supreme Court Or Tenth Circuit Authority Supports Granting An Automatic Stay Upon The Filing Of A Motion To Dismiss.**

Multiple courts in this District have stated that "[t]he mere pendency of a Motion to Dismiss . . . does not entitle [the] [d]efendant to a complete and indefinite stay." *Vaupel v. United States*, No. 07-cv-01443-MSK-KLM, 2008 U.S. Dist. LEXIS 43730, at *6 (D. Colo. June 3, 2008); *Marks v. Lynch*, Civil Action No. 16-cv-02106-WYD-MEH, 2017 U.S. Dist. LEXIS 16234, at *6 (D. Colo. Feb. 6, 2017). And the Tenth Circuit Court of Appeals stated almost thirty years ago that "the right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d

[4] Another benefit of employing an approach that includes a "preliminary peek" is that it better complies with Rule 26(c)'s "good cause" mandate, which is the basis for a court to stay discovery. *See* Fed. R. Civ. P. 26(c).

[5] *See also United States ex rel. Howard v. Shoshone Paiute Tribes*, No. 2:10-cv-01890-GMN-PAL, 2012 U.S. Dist. LEXIS 84455, at *1 (D. Nev. June 14, 2012) (holding that "a district court may stay discovery only if it is convinced that the plaintiff cannot state a claim for relief."); *Sams v. Ga W. Gate, LLC*, No. CV415-282, 2016 U.S. Dist. LEXIS 75974, at *15 (S.D. Ga. June 10, 2016) ("Generally, a stay should be granted only where the motion to dismiss appears, upon preliminary review, 'to be clearly meritorious and truly case dispositive,' rendering discovery a mere futile exercise.") (quoting *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006) (citing *Feldman*, 176 F.R.D. at 652-53)).

1477, 1484 (10th Cir. 1983). Simply put, "[t]he Rules do not provide for discovery stays like the one Defendants seek as a matter of course pending the resolution of dispositive motions." *In re Broiler Chicken Grower Litig.*, No. 6:17-CV-00033-RJS, 2017 U.S. Dist. LEXIS 142069, at *9 (E.D. Okla. Sep. 1, 2017).

3.3 **Applying Either The *String Cheese* Factors – Or The Modified *String Cheese* Factors –To The Facts Here Confirms That Discovery Should Proceed As To All Defendants.**

Considering the relevant interests involved and "[t]he strong presumption against stays," *Pandaw Am.,* 2012 U.S. Dist. LEXIS 704, at *6, Defendants have not met their heavy burden to show that the filing of a motion to dismiss constitutes "extreme circumstances" so as to justify a stay. *Robert W. Thomas*, 2012 U.S. Dist. LEXIS 114092, at *6-7.

3.3(a) **Plaintiff's interest in proceeding expeditiously militates in favor of allowing discovery to proceed.**

Plaintiff's "interest in proceeding with the lawsuit are manifest." *Id.* at *10. Granting Defendants' motion to stay "could delay the proceedings for an unknown period of time until there is a ruling on [the motion to dismiss] and . . . the delay would significantly impact and prejudice [Plaintiff's] right to pursue [their] case and vindicate [their] claim[s] expeditiously." *See String Cheese Incident*, 2006 U.S. Dist. LEXIS 97388, at *6 (citation omitted). The longer Plaintiff must wait to obtain discovery, the more likely its value will be diluted. "[W]ith the passage of time, the memories of the parties and other witnesses may fade, witnesses may relocate or become unavailable, or documents may become lost or inadvertently destroyed." *Lester v. Gene Express, Inc.*, No. 09-cv-02648-REB-KLM, 2010 U.S. Dist. LEXIS 25379, at *2-3 (D. Colo. Mar. 2, 2010).[6] In this respect, "delay may diminish Plaintiff[s'] ability to proceed

[6] *See also Marks*, 2017 U.S. Dist. LEXIS 16234, at *7 (denying motion to stay, in part, because

and may impact [their] ability to obtain a speedy resolution of [their] claims." *Id.*, at *3.[7]

Moreover, Plaintiff has an inherent "right to have [her] claims heard without undue delay." *Jones v. Clinton*, 72 F.3d 1354, 1363 (8th Cir. 1996); *Zukowski v. Howard, Needles, Tammen, & Bergendoff*, 115 F.R.D. 53, 58 (D. Colo. 1987) (acknowledging that "justice delayed is justice denied" and "suffer[ing] no illusions that time and justice are unrelated"). "[A] stay of proceedings in a civil case pending resolution of a dispositive motion can last several months or more." *Breckenridge*, 2016 U.S. Dist. LEXIS 168543, at *4.[8] This Court should fully consider the prejudice that would be inflicted upon Plaintiff if a stay is granted.

3.3(b) **Allowing discovery to proceed does not unfairly burden Defendants.**

Defendants have shown no particularized facts that demonstrate they will suffer a clearly defined and serious harm associated with moving forward with discovery. "[W]here a movant seeks relief that would delay court proceedings by other litigants [it] must make a strong showing of necessity because the relief would severely affect the rights of others." *Commodity Futures Trading*, 713 F.2d at 1484. "[A]bsent an extraordinary or unique burden imposed by the discovery at issue," courts often find that "on balance, a consideration of the first two *String Cheese* factors weigh against the imposition of a stay." *Wells v. Dish Network, LLC*, No. 11-cv-

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"staying the entire case while Defendant's motion to dismiss is pending could substantially delay the ultimate resolution of the matter, with adverse consequences such as a decrease in evidentiary quality and witness availability.").

[7] *See also Hargroves v. City of New York*, No. 03 CV 1668 (RRM) (ALC), 2010 LEXIS 94664 (E.D.N.Y. Sep. 10, 2010), *at 12 ("[T]he [p]laintiff has the burden of proof, and as the case continues to languish, it may become more difficult for [the] [p]laintiff to locate documents and witnesses.").

[8] *See also Chavez*, 2007 U.S. Dist. LEXIS 15054, at *4 (average time from filling of dispositive motion to its determination in this District in 2006 was 7.5 months); *Ruampant v. Moynihan*, No. 06-cv-00955-WDM-BNB, 2006 U.S. Dist. LEXIS 57304, at *3 (D. Colo. Aug. 11, 2006) (average time in 2005 was 9.4 months).

00269-CMA-KLM, 2011 U.S. Dist. LEXIS 66948, at *4 (D. Colo. June 22, 2011). Defendants have not shown any "extraordinary or unique burden" supporting departure from that norm. *Id.*

In their motion, Defendants state "Defendants will be forced to defend a matter which might otherwise prove to be barred." [Doc. #35], p. 10. This is one form of "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, [that] do not satisfy the Rule 26(c) test." *Trinos v. Quality Staffing Servs. Corp.*, 250 F.R.D. 696, 698 (S.D. Fla. 2008); *Marks*, 2017 U.S. Dist. LEXIS 16234, at *7 (holding that the moving party "must show specific facts demonstrating that the challenged discovery will result in a clearly defined and serious injury to the party seeking protection"). Defendants have failed to meet their burden.

In sum, "[t]he ordinary burdens with litigating a case do not constitute undue burden." *Lester*, 2010 U.S. Dist. LEXIS 25379, at *3. Defendants have not made a specific and particular factual showing establishing an extraordinary or unique burden in being subject to discovery while their anticipated motion to dismiss is pending. Nor does the mere fact that they filed a motion to dismiss entitle them to claim any special burden in proceeding with discovery pending a ruling. "[T]he pendency of a run-of-the-mill motion to dismiss for failure to state a claim under Rule 12(b)(6) . . . [does not] constitute 'extraordinary circumstances.'" *Chavez*, 2007 U.S. Dist. LEXIS 15054, at *6-7.[9]

3.3(c) **Convenience to the Court, the public interest, and the interests of third parties are all served by allowing discovery to proceed.**

This District's general policy to not stay discovery pending a ruling on a motion to dismiss recognizes that there are "burdens to the court and to the public in delaying, potentially

[9] *See Breckenridge*, 2016 U.S. Dist. LEXIS 168543, at *5 ("Generally, it is the policy in this District not to stay discovery pending a ruling on motions to dismiss. This is particularly true where, as in this case, the motion to dismiss may just as well be denied as it is granted.").

for months, those cases where a motion to dismiss is filed." *Sutton v. Everest Nat'l Ins. Co.*, No. 07-cv-00425-WYD-BNB, 2007 U.S. Dist. LEXIS 34075, at *5 (D. Colo. May 9, 2007). A stay is not an efficient use of judicial resources because of the impact it has on a court's management of its docket. *A.A. v. Martinez*, No. 12-cv-00732-WYD-KMT, 2012 WL 2872045, at *9-10 (D. Colo., July 12, 2012). "The Court is inconvenienced by an ill-advised stay because the delay in prosecuting the case which results from the imposition of a stay makes the Court's docket less predictable and, hence, less manageable," especially when, as here, "the stay is tied to . . . pending motion on which ultimate success is not guaranteed." *Lester*, 2010 U.S. Dist. LEXIS 25379, at *4-5; *see also Patterson v. Santini*, No. 11-cv-01899-RM-KLM, 2014 U.S. Dist. LEXIS 12128 at *7 (D. Colo. Jan. 31, 2014) ("It is not convenient for the Court to have stale cases cluttering its docket."). Indeed, if discovery were stayed in every other case where a motion to dismiss is filed or qualified immunity is raised as a defense, courts would encounter extreme difficulty in managing their dockets. *See Chavez*, 2007 U.S. Dist. LEXIS 15054, at *6-7 (stating that general discovery deadlines set by the judge for all litigants "could not be met if cases routinely [were] stayed while motions to dismiss [were] pending"). This Court's interests in cultivating a manageable, predictable, and efficient docket weigh against further delay.

For similar reasons, a delay in court proceedings harms the public interest and the interests of other third parties who may be affected by this litigation. There is a "strong interest held by the public in general regarding the prompt and efficient handling of all litigation." *Lester*, 2010 U.S. Dist. LEXIS 25379, at *5.[10] Delay is "of social concern" because it "is cost prohibitive and threatens the credibility of the justice system." *Chavez*, 2007 U.S. Dist. LEXIS

[10] *See also Pandaw Am.*, 2012 U.S. Dist. LEXIS 704, at *6 ("The public interest . . . underlying all lawsuits [is] that they be resolved as fairly and quickly as possible.").

15054, at *4-5.

> The relation between case disposition time and civil justice goals is straightforward. . . . . Delays in the resolution of civil disputes erode public confidence in the civil justice system, disappoint and frustrate those seeking compensation through the legal system, and generate benefits for those with the financial ability to withstand delays or otherwise benefit from them. Such factors, individually and collectively, undermine public faith and confidence in the ability of our civil justice system to operate efficiently and, more importantly, equitably.

Michael Heise Justice Delayed: *An Empirical Analysis of Civil Case Disposition Time*, 50 Cas. W. Res. L. Rev. 813, 814 (2000). Without confidence in our justice system, those who need the courts to vindicate their rights may not seek judicial remedies, thereby never receiving the relief to which they are entitled.

Other third-party individuals, as well as the public in general, plainly have a strong interest "in learning as soon as possible whether [Plaintiff's] allegations are true. *"V.S." v. Muhammad*, 2008 U.S. Dist. LEXIS 96099, at *10 (E.D.N.Y. Nov. 24, 2008). This interest is analogous to the interests of third parties and the public the court found implicated by a stay in *Morgan v. Clements*, No. 12-cv-00936-REB-KMT, 2013 U.S. Dist. LEXIS 33935, at *12-13 (D. Colo. Mar. 12, 2013). In *Morgan*, the Court found that because plaintiffs alleged that the Colorado Department of Corrections was detaining parolees longer than necessary, "the public [had] an interest in assuring that institutions such as the Department of Corrections [were] operating within the bounds of the law." *Id.*[11]

Likewise, here, the public has the right to know whether Fort Collins police officers are using grossly excessive force against its citizens. *See A.A.*, 2012 WL 2872045, at *14 ("[T]he

[11] *see also Estate of Reat v. Rodriguez*, No. 12-cv-02531-REB-MEH, 2013 U.S. Dist. LEXIS 14839, at *13 (D. Colo. Feb. 4, 2013) ("[A]ny delay in the prosecution of this case affects not only the parties, but all persons who may benefit from the proposed polic[y]changes Plaintiff hope[s] to accomplish.").

public interest is well served by prompt and efficient handling of litigation, particularly where the litigation involves allegations against public officials."). Thus, because Plaintiff's allegations "call into question . . . the competence and good faith" of public entities, the interests of third parties and the public in in quickly discovering the veracity of Plaintiff's allegations weigh against granting a stay. *See "V.S."*, 2008 U.S. Dist. LEXIS 96099, at *10.

3.3(d) **A preliminary peek reveals that Defendants' Motion To Dismiss does not have a likelihood of success.**

"In assessing the propriety of a stay, [the] court must consider: whether the movant is likely to prevail in the related proceeding[.]" *Waisanen*, 2009 U.S. Dist. LEXIS 123427, at *4 (citing *Landis*, 299 U.S. at 254); *see also Nakivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D. Fla. 2003) ("[I]t is helpful, and often necessary, to 'take a preliminary peek' at any pending dispositive motions to see if the motions appear to be meritorious and 'truly case dispositive.'" (citation omitted)).

In this case, "both statistically and in consideration of the burden on the moving party, there is a substantial likelihood [Defendants] will not prevail on" their Motion to Dismiss. *Gen. Steel Domestic Sales, LLC v. Steelwise, LLC*, No. 07-cv-01145-DME-KMT, 2008 U.S. Dist. LEXIS 101609, at *23 (D. Colo. Nov. 26, 2008); *see also Hall v. Town of Gilcrest*, No-cv-00327-REB-BMB, 2011 U.S. Dist. LEXIS 44809, at *4 (D. Colo. Apr. 20, 2011) ("[M]otions to dismiss are denied far more often than they result in termination of a case," so "it is more likely than not from a statistical standpoint that a delay pending a ruling on [Defendants'] [M]otions to [D]ismiss would prove unnecessary."). Plaintiff previously has briefed the reasons why Defendants' motion should fail, [Doc. #28], and will not burden the Court with repeating these

argument and authorities. Instead, Plaintiff incorporates them herein. However, a few points raised in Defendants' Reply In Support Of Motion To Dismiss, [Doc. #34], merit discussion.

First, binding Tenth Circuit authority on this issue compels denial of Defendants' Motion to Dismiss. *See Martinez v. City of Albuquerque*, 184 F.3d 1123, 1126 (10th Cir. 1999). In *Martinez*, the Tenth Circuit considered whether a plaintiff's excessive force claim was barred by *Heck*, where the plaintiff had been convicted of resisting arrest under the following circumstances (which are analogous to the facts alleged in the Complaint in this matter):

> According to the state criminal complaint, on January 20, 1994, Martinez, while in his vehicle, solicited an undercover female police officer for sex. When surveillance officers from the Albuquerque Police Department approached his vehicle, [the plaintiff] "attempted to flee through a dirt lot." A brief chase ensued. A few seconds later, [the plaintiff] stopped his vehicle, locked the doors, and rolled down the window. With his hands gripping the steering wheel, [the plaintiff] claimed he had done nothing wrong. When [the plaintiff] refused to exit his vehicle, one of the arresting officers reached in the window to unlock the door. [The plaintiff] rolled up the window on the officer's arm. Another officer struck [the plaintiff] in the face and unlocked the vehicle. The officers then arrested [the plaintiff]. The entire incident lasted only two to three minutes.
>
> Subsequently, the Metropolitan Court for Bernalillo County found [the plaintiff] guilty of resisting arrest in violation of N.M. Stat. Ann. § 30-22-1 (Michie 1978). The court acquitted [the plaintiff] on the remaining charges. [The plaintiff] appealed and after much pretrial wrangling over discovery, the state district court held a de novo bench trial in which it sustained the metropolitan court's judgment. The district court sentenced [the plaintiff] to eight months supervised probation. Review of [the plaintiff]'s state court conviction currently is pending before the New Mexico Court of Appeals.

The plaintiff in *Martinez* then filed a Section 1983 action alleging excessive force. The district court granted the police officers' motion to dismiss based on *Heck*. The Tenth Circuit reversed. In doing so, the Tenth Circuit reasoned "whether [the plaintiff] resisted arrest by initially fleeing the scene is a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest." *Martinez v. City of Albuquerque*, 184 F.3d

1123, 1126 (10th Cir. 1999). The Court also noted that "whether [the plaintiff] resisted arrest by failing to heed instructions and closing his vehicle's window on the officer's arm is likewise a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest." *Id.* at 1127. Here, by comparison, whether Plaintiff resisted arrest by asking the officer not to touch or grab her or attempting to free her arm from the officer's grasp is a question separate and distinct from the whether Defendant Klasmer exercised excessive force in effectuating her arrest.

Additionally, a case relied on heavily in *Martinez* is instructive. In *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997), the plaintiff filed a Section 1983 excessive force claim against officers who had arrested him. The plaintiff had previously been convicted of resisting arrest in state court. The Third Circuit held that *Heck* did not bar the plaintiff from bringing his claims in federal court. In doing so, the Third Circuit explained that in footnote six of *Heck*, the Supreme Court intended to demonstrate that a civil suit for an unreasonable seizure predicated on a false arrest would be barred so long as a conviction for resisting the same arrest remained unimpaired because the lawfulness of the arrest is a necessary element of the criminal offense of resisting arrest. *Id*. at 145. Thus, the Third Circuit reasoned, since a plaintiff would not necessarily have to negate the element of the arrest's lawfulness to prevail in an excessive force claim to prevail, a state court conviction for resisting arrest did not prohibit him from pursuing his Section 1983 excessive force claim against the arresting officer. *Id.* at 145-46. Therefore, because the plaintiff in *Nelson* had not claimed that the police officer in his case falsely arrested him, but rather claimed that the officer "effectuated a lawful arrest in an unlawful manner," the plaintiff's claims were not barred by *Heck*. *Id.* Similarly here, careful comparison between *Heck* and the facts of this case demonstrates that to the extent Plaintiff's federal suit does not challenge the lawfulness

of her arrest and conviction (a challenge *Heck* would prohibit at this point), *Heck* does not bar her from pursuing her excessive force claims in federal court.

Finally, all of the district court cases cited by Defendants do not support a likelihood of dismissal of Plaintiff's claims under *Heck*. [Doc. #34], pp. 2-3.[12] In *Agyemang*, *Kennedy*, *Johnson*, *Dye*, and *Oates*, the District Court dismissed excessive force claims under *Heck* when the plaintiff had been convicted of resisting arrest and his excessive force claim was based on pre-arrest excessive force. Clearly, those cases are distinguishable from the case-at-bar, where Plaintiff alleges that Defendant Klasmer's post-arrest excessive force forms the basis for her claims. Moreover, this precedent is merely persuasive authority on this Court and this Court should follow *Martinez* in holding that, after conducting a preliminary peek, Defendants' Motion to Dismiss lack merit.

Defendants' failure to make a preliminary showing that their motion based on *Heck* is likely meritorious makes the policy reasons for not subjecting them to the burdens of discovery disappear.

4. **CONCLUSION**

When considering all of the *String Cheese* factors (through the lens of the preliminary peek framework), it is evident that Defendants' Motion to Stay should be denied. For the reasons

[12] Citing *Agyemang v. City of Aurora Mun. Court*, Civil Action No. 15-cv-00734-LTB, 2015 U.S. Dist. LEXIS 60628 (D. Colo. May 8, 2015); *Kennedy v. Golden*, Civil Action No. 13-cv-00920-REB-KLM, 2014 U.S. Dist. LEXIS 106409 (D. Colo. Mar. 4, 2014); *Johnson v. Heinis*, Civil Action No. 11-cv-03135-WJM-KLM, 2013 U.S. Dist. LEXIS 62342 (D. Colo. Mar. 28, 2013); *Dye v. Colo. Dep't of Corr.*, Civil Action No. 12-cv-02061-PAB-KLM, 2013 U.S. Dist. LEXIS 42453 (D. Colo. Mar. 26, 2013); *Oates v. Patella*, Civil Action No. 11-cv-01871-REB-KLM, 2012 U.S. Dist. LEXIS 22715 (D. Colo. Feb. 1, 2012)

set forth herein, Plaintiff respectfully requests that this Court deny Defendants' Motion To Stay Discovery [Doc. #35] in its entirety.

DATED this 29th day of July 2019.

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CERTIFICATE OF SERVICE

I certify that on this 29th day of July, 2019 I filed a true and correct copy of the foregoing via CM/ECF which will generate emailed notice to the following:

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