IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS;
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity;
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity;
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity;
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity; and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

CITY DEFENDANTS' MOTION TO STAY DISCOVERY

Defendants the City of Colorado Springs ("City"), B.K. Steckler, Jason S. Otero, and Roy A. Ditzler (collectively, "City Defendants") move to stay all discovery in this case pending resolution of their forthcoming motions to dismiss.

CERTIFICATE OF CONFERRAL UNDER D.C.Colo.L.Civ.R. 7.1(a): Undersigned counsel mentioned her intent to file a motion to stay discovery during the status conference held on

September 13, 2023. At that same conference, Plaintiffs' representatives voiced their opposition to the motion to stay, prompting the Court to set a briefing schedule for this motion. (Doc. 21)

Introduction

Discovery in this case should be stayed because the City Defendants—and it is understood that the remaining FBI Defendants as well—anticipate at this time that they will move to dismiss all claims asserted against them. Thus, to proceed into discovery—a taxing process for the Court, the parties, and the many non-parties who would be burdened by discovery in this case—could prove to be wasteful. Not only will the individual City Defendants (Steckler, Otero, and Ditzler) assert qualified immunity as to Plaintiffs' claims under 42 U.S.C. § 1983, but also the burden on the Defendants, the convenience to the Court, the interests of non-parties, and the public interest all weigh in favor of staying discovery in this case until the Court rules on the Defendants' forthcoming motions to dismiss.

Background Facts

1. Plaintiffs' complaint arises out of two separate courses of events: (1) the search and seizure of Plaintiff Jacqueline Armendariz's cell phones, computers, and digital storage devices by Officers Summey and Ditzler; and (2) the search and seizure of Plaintiff Chinook Center's Facebook page by Officers Steckler and Otero. Plaintiffs allege that the Defendants sought and executed the search warrants following a protest that Plaintiff Chinook Center organized and in which Plaintiff Armendariz participated because they disagree with the Plaintiffs' political expression. They contend that the individual Defendants sought the warrants pursuant to City custom, policy, and practice. (Id. ¶¶ 134-35)

2. All of the searches and seizures were conducted pursuant to warrants issued by

Colorado state court judges. (Doc. 12, Am. Compl. ¶¶ 55-56, 87-88, 112-118) In addition, Plaintiff Armendariz ultimately pled guilty or no contest to obstruction of a peace officer based on the conduct for which the warrant was sought. (Id. ¶ 119)

3. Plaintiffs nonetheless contend that the warrants were unconstitutionally overbroad. (Id., ¶¶ 134-35)

4. Plaintiffs assert claims against Defendants summarized in the following table:

#	Plaintiff	Claim	Summey	Ditzler	Steckler	Otero	City	FBI
1	Armendariz	§ 1983 – 1st & 4th Am., unlawful search & seizure	X	X			X	
4	Armendariz	Colo. Const. – unlawful search & seizure abridging freedom of speech and assembly	X	X				
6	Armendariz	Injunctive Relief under 1st, 4th Amends., 5 USC 702						X
2	Chinook Center	§ 1983 – 1st & 4th Am., unlawful search & seizure			X	X	X	
3	Chinook Center	18 U.S.C. § 2703 – Viol. Of Stored Communications Act			X	X	X	
5	Chinook Center	Colo. Const. – unlawful search & seizure abridging freedom of speech and assembly			X	X		

(Doc. 12, Am. Compl. at 39-50)

Argument

The Court Should Issue An Order Staying Discovery Until The Court Rules On Defendants' Forthcoming Motions To Dismiss.

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. See String Cheese Incident, LLC v. Stylus Shows, Inc., No. 02–CV–01934–LTB–PA, 2006 WL 894955, at *2 (D. Colo. March 30, 2006). Federal Rule of Civil Procedure 26 does, however, provide that

> [a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

Fed. R. Civ. P. 26(c)(1). Moreover, "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Landis v. N. Am. Co., 299 U.S. 248, 254–255 (1936) (citing Kansas City S. Ry. Co. v. United States, 282 U.S. 760, 763 (1931)). An order staying discovery is thus an appropriate exercise of this Court's discretion. Id.

In determining whether to grant a stay, courts in this district typically consider the following factors: (1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. String Cheese Incident, 2006 WL 894955, at *3. These considerations weigh in favor of staying discovery until the Court rules on Defendants forthcoming motions to dismiss.

I. Supreme Court and Tenth Circuit Precedent Instructs that Discovery Should be Stayed Upon an Individual Defendant's Assertion of Qualified Immunity.

In City Defendants' anticipated motions to dismiss, all individual Defendants expect to assert that qualified immunity bars Plaintiffs' Section 1983 claims against them. The Supreme Court unambiguously has opined that discovery should not go forward as to claims against a defendant who has asserted qualified immunity in a motion to dismiss:

- The Court rejects "the careful-case-management approach" and prohibits *all* "discovery, cabined or otherwise," where defendants assert qualified immunity in a pending motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009).
- "[I]f the defendant does plead the [qualified] immunity defense, the district court should resolve that threshold question before permitting discovery." Crawford-El v. Britton, 523 U.S. 574, 598 (1998).
- "The [qualified immunity] defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery ..., as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (emphasis and ellipses in original; citations omitted).
- "'Until this threshold immunity question is resolved, discovery should not be allowed.'" Siegert v. Gilley, 500 U.S. 226, 231 (1991) (citation omitted).
- "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is *entitled* to dismissal before the commencement of discovery." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis added).
- "Until this threshold immunity question is resolved, discovery should not be allowed." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

An oft-quoted sentence from Rome v. Romero, 225 F.R.D. 640 (D. Colo. 2004), attributed to Crawford-El v. Britton, 523 U.S. 574, 593 n.14 (1998), has convinced some judges in this district that discovery may go forward despite the pendency of a motion to dismiss asserting qualified immunity. That sentence—"qualified immunity does not protect an official from *all* discovery, but only from that which is 'broad-reaching,'" *Rome*, 225 F.R.D. at 643 (emphasis in original)—however, has repeatedly been taken out of context and misused. To begin, in Crawford-El, the Supreme Court made clear that discovery should not be had from a defendant asserting qualified immunity in a motion to dismiss before a ruling on the motion; only if the plaintiff's claims survive the motion to dismiss might some *limited* discovery from that defendant permissibly ensue:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options *prior to permitting any discovery at all*. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. This option exists even if the official chooses not to plead the affirmative defense of qualified immunity. Second, if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to *some* discovery.

Crawford-El, 523 U.S. at 597-98 (internal citations omitted; italics in original; underlining added).

The Court went on to discuss options available to District Courts in fashioning limited discovery *after the motion to dismiss ruling* that honors the qualified immunity defense, making clear that "limited discovery may sometimes be necessary before the district court can resolve *a motion for summary judgment* based on qualified immunity." *Id.* at 593 n.14 (emphasis added). But the Supreme Court expressed that the motion to dismiss "hurdle[]" should be cleared before discovery commences in qualified immunity cases. *Id.* at 598.

In fact, in Rome v. Romero, 225 F.R.D. 640 (D. Colo. 2004), the District Court did *not* allow discovery to proceed while a motion to dismiss based on qualified immunity was pending. Rather, it stated based on Crawford-El that "limited discovery may be necessary where the [qualified immunity] doctrine is asserted in a *motion for summary judgment* on contested factual assertions." Rome, 225 F.R.D. at 643 (emphasis added). In the case, "although the individual Defendants asserted qualified immunity in their Answers, they did not seek a ruling on the issue until they filed the Motion for Summary Judgment, after discovery already had been opened." Id. at 644. The District Court therefore allowed "limited discovery regarding the actual conduct" to proceed in the face of the motion for summary judgment, consistent with Crawford-El. Id. But as the Court in Rome emphasized, the "Supreme Court has suggested that, in order to avoid unnecessary exposure to burdensome discovery, the preferred practice is for the official to move to dismiss the claim on the grounds of qualified immunity before discovery is ordered." Rome, 225 F.R.D. at 643.

Based on the foregoing, Courts and litigants that rely on Rome and, by extension, Crawford-El, to support proceeding with discovery while a motion to dismiss based on qualified immunity is pending do so in error. True, qualified immunity does not necessarily protect an

official from *all* discovery. Limited discovery may be warranted if no motion to dismiss asserting qualified immunity is filed or if it is filed and denied. But qualified immunity is intended to protect an official from discovery until a motion to dismiss asserting it is ruled upon.

Additionally, in Iqbal, the Supreme Court opined that where discovery as to other parties "would prove necessary" for those who have asserted qualified immunity to participate with their counsel, it too should be stayed pending the resolution of the defendant's motion to dismiss based on qualified immunity:

> It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Iqbal, 556 U.S. at 685-86.

This language from Iqbal convinced the late U.S. District Court Judge Wiley Y. Daniel that it is "clearly erroneous or contrary to law" under Federal Rule of Civil Procedure 72(a) for a magistrate judge *not* to stay all discovery as to all claims while an individual defendant's motion to dismiss based on qualified immunity is pending. A.A. ex rel. Archuletta v. Martinez, No. 12-CV-00732-WYD-KMT, 2012 WL 5974170, at *2 (D. Colo. Oct. 9, 2012). In Archuletta, the plaintiff sued four persons in their individual capacity and a fifth person in his official capacity. Id. One of the defendants sued in his individual capacity (Foxworth) moved to dismiss the Section 1983 claims against him based on qualified immunity. Id. at *1. With his motion to dismiss, Foxworth sought a stay of all discovery in the case pending a ruling on his motion to dismiss. Id. The magistrate judge stayed discovery as to claims against Foxworth but refused to stay discovery

on the claims against the other defendants. Id. Foxworth objected in part to the magistrate judge's order pursuant to Rule 72(a). Id. Based on Iqbal, Judge Daniel sustained Foxworth's objection. Id. at *2. After quoting the above from Iqbal, Judge Daniel explained:

> While the above statements are dicta, they indicate very clearly that the Supreme Court believes discovery should be stayed in the case as a whole even when only one defendant is asserting qualified immunity…. I find based on Iqbal that the July 12, 2012 Order of Magistrate Judge Tafoya should be reversed as to its decision to stay discovery only as to Defendant Foxworth as clearly erroneous or contrary to law. I find that all proceedings in this case should be stayed until resolution of Foxworth's Motion to Dismiss asserting the defense of qualified immunity.

Id. Thus, "strong … Supreme Court and Tenth Circuit precedent favors stays while issues of qualified immunity remain pending." Weitzman v. McFerrin, No. 17-CV-02703-KLM, 2019 WL 3935175, at *2 (D. Colo. Aug. 19, 2019), citing Martin v. County of Santa Fe, 626 Fed. App'x 736, 740 (10th Cir. 2015) ("discovery generally should be avoided once qualified immunity is raised") and Archuletta, 2012 WL 5974170, at *2. See also Jiron v. City of Lakewood, 392 F.3d 410, 414 (10th Cir. 2003) (noting that a qualified immunity assertion protects an official from the ordinary burdens of litigation, including discovery); Workman v. Jordan, 958 F.2d 332, 336 (10th Cir. 1992) (same).

In this case, all discovery should be stayed based on the individual Defendants' forthcoming assertion of qualified immunity. As stated by the Supreme Court, the individual Defendants have a "right" to such a stay. Behrens, 516 U.S. at 308. In addition, discovery as to Plaintiffs' additional claims against the City Defendants, both against the individuals (under the Colorado Constitution and the Stored Communications Act) and against the City (under the First and Fourth Amendments to the United States Constitution and the Stored Communications Act), should be stayed because they are inextricably intertwined with Plaintiffs' Section 1983 claims

against the individual Defendants. They all arise out of the individual Defendants' searches and seizures of Plaintiffs' property which, Plaintiffs allege, were conducted "[p]ursuant to" the "custom, policy, and practice of CSPD and the City of Colorado Springs." (Doc. 12, ¶¶ 130-131) Thus, discovery concerning Plaintiffs' Stored Communications Act, Colorado Constitution, and municipal liability claims "would prove necessary" for the individual Defendants to participate. Iqbal, 556 U.S. at 685-86. All discovery as to the City Defendants should therefore be stayed.

II. The String Cheese Incident Factors Weigh in Favor of a Stay.

A. Interests of and Prejudice to the Plaintiff

Plaintiffs' interest in conducting discovery while the Defendants' motions to dismiss are pending is limited to a "general" interest in proceeding expeditiously with discovery, an interest shared by "virtually all plaintiffs," which fails to justify a denial of Defendants' motion to stay. Edwards v. Zenimax Media, Inc., No. 12-cv-00411-WYD-KLM, 2012 WL 1801981, at *2 (D. Colo. May 17, 2012) (finding that "this factor weighs in favor of a stay of discovery" where the plaintiff feared prejudice merely due to "'stale or missing evidence, unavailable and destroyed documents, increasingly unavailable or uninformed witnesses, and unmanageably short discovery deadlines'" (citation omitted)). See also Carey v. Buitrago, No. 19-CV-02073-RM-STV, 2019 WL 6215443, at *1 (D. Colo. Nov. 21, 2019) ("Plaintiff's general interest in proceeding expeditiously does not overcome the factors discussed below that weigh in favor of a stay.").

B. Burden on the Defendants

While " 'ordinary burdens associated with litigating a case do not constitute undue burdens,' " it is "particularly" imprudent to "mov[e] the case forward" into discovery here. Devillaz v. Atmosphere Gastropub, Inc., No. 22-CV-00126-WJM-MDB, 2022 WL 17225815, at

*4 (D. Colo. Nov. 25, 2022) (citation omitted). As discussed above, it is understood at this time that all Defendants intend to move to dismiss all claims asserted against them. If granted, their motions to dismiss could "completely dispose of the case." Id. Thus, to proceed into discovery " 'could be wasteful,' " which outweighs any interest Plaintiffs have "in proceeding expeditiously with the case." Id. (citation omitted).

Next, the nature of Plaintiffs' claims make proceeding into discovery particularly unwise, for a couple of reasons. First, Plaintiffs attack two very different types of search warrants in their Amended Complaint, each allegedly drafted and approved by different Defendants. Ms. Armendariz asserts two claims against Officers Summey and Ditzler based on a search warrant that authorized the search of her digital devices for certain specific terms during a specific time frame. (Doc. 12 at 39, 47) The Chinook Center, by contrast, asserts three claims against Officers Steckler and Otero based on a search warrant that authorized the search of "All Facebook Messenger chats tied" to its Facebook page for a one-week period. (Id. at 42, 45, 49) Officers Summey and Ditzler are not alleged to have participated in the search of the Chinook Center's Facebook page, and Officers Steckler and Otero are not alleged to have participated in the search of Ms. Armendariz's electronic devices. Thus, even if Defendants' motions to dismiss are not entirely successful, there is great potential for the narrowing of parties and claims that would proceed into discovery. For example, if the warrants directed to Ms. Armendariz's property are upheld, she, Detective Summey and Officer Ditzler would not need to participate at all in the action. Likewise, if the warrant concerning the Chinook Center's Facebook page is ratified, the Chinook Center, Officer Steckler, and Officer Otero could be completely excised from the case.

In addition, Plaintiffs assert both federal and state law claims against the individual

Defendants. (Doc. 12, pp. 39-49) If, for example, Plaintiffs' federal claims are dismissed, it is likely that this Court would not retain supplemental jurisdiction over Plaintiffs' remaining claims under the Colorado Constitution.

Finally, although City Defendants continue to research the arguments that warrant dismissal of Plaintiffs' claims, it is worth reiterating that the warrants Plaintiffs challenge in this case were issued by Colorado state court judges, which "is the clearest indication that the officers acted in an objectively reasonable manner." Messerschmidt v. Millender, 565 U.S. 535, 546 (2012) (citation omitted). (See also Doc. 12, Am. Compl. ¶¶ 55-56, 87-88, 112-118).

Considering all of the above, requiring the parties to submit to full discovery at this time would subject Defendants to undue burden and expense. This factor strongly favors a stay.

C. Convenience to the Court

"[J]udicial economy and resources would plainly be wasted if the Court allowed discovery to proceed, only to later determine that the case must be dismissed …." Adamson v. Volkswagen Grp. of Am., Inc., No. 22-CV-00740-CMA-MDB, 2022 WL 4767573, at *4 (D. Colo. Oct. 3, 2022). Since the issues that City Defendants currently expect to raise in forthcoming motions to dismiss are dispositive, staying discovery "may allow the Court to avoid expending resources in managing an action that ultimately will be dismissed." Ashaheed v. Currington, No. 1:17-cv-03002-WJM-SKC, 2019 WL 11690136, at *2 (D. Colo. Nov. 4, 2019) (citation and quotation omitted). Thus, the third factor weighs in favor of a stay.

D. Interests of non-parties

Discovery in this action would involve many non-parties. Plaintiffs' Amended Complaint alone alleges that the following non-parties participated in the complained-of events:

- Detective April Rogers, who allegedly "sp[ied] on the Chinook Center" (Doc. 12, ¶¶ 25-29);
- Commander John Koch, who allegedly ordered arrests of protesters (id., ¶¶ 30-32, 40);
- Officer Scott Alamo, who allegedly made statements in support of arresting protesters (id., ¶¶ 34-37);
- Lieutenant Chacon, who allegedly was directed to arrest the protesters if they began to march in the street (id., ¶ 38);
- Officer Anthony Spicuglia, who was the victim of Ms. Armendariz's "obstruction" with her bicycle (id., ¶¶ 43, 119);
- Deputy District Attorney R. Short, who allegedly filed a request to seal the search warrant pertaining to Ms. Armendariz's digital devices (id., ¶ 116); and
- The City Attorney, who allegedly represented to City Council that police still were working on identifying "the woman who 'threw her bicycle in front of an officer'" several weeks after the protest. (Id., ¶ 44)

Internal records collected so far by City Defendants show that approximately forty police officers participated in responding to the July 31, 2021 protest in various roles, all of whom may be subjected to discovery regarding Plaintiffs' allegations that the warrants were motivated by Plaintiffs' speech rather than their conduct. (See id., ¶¶ 3-5)

Discovery from non-parties such as the Office of the District Attorney for the Fourth Judicial District, the El Paso County Combined Courts, and the Colorado Springs Municipal Court would be warranted in relation to the District Attorney's Office's request to seal the warrant (id., ¶ 116), Ms. Armendariz's plea negotiations and agreement (id., ¶ 119), and the prosecutions of other protest participants and Chinook Center members Johnathan Christiansen, Charles Johnson,

Nathan Shulkin, Shaun Walls, and Alexander Archuleta. Records concerning and depositions of these non-parties will be probative of the truthfulness of Plaintiffs' allegations and of Defendants' defenses.

In addition, records reflect that a multitude of other third parties may be drawn into discovery. For example, the execution of the search warrant on Ms. Armendariz's digital devices revealed text messages she sent to "LeAnn," "Jasmine," "Madeline," and "Allen Beauchamp" regarding the protest that are highly probative of her guilt for obstruction of a peace officer, thereby demonstrating the propriety of the warrant's purpose and scope. "The fourth factor also supports the imposition of a stay, given that the [City's] briefing identifies at least two anticipated third-party deponents." Adamson, 2022 WL 4767573, at *4.

E. Public Interest

"[T]here is no question that the general public's primary interest in this case is an efficient and just resolution. 'Avoiding wasteful efforts by the court and the litigants serves that purpose.' " Devillaz, 2022 WL 17225815, at *4 (citation omitted). Since the motions to dismiss may conclude this case before the parties expend resources on discovery, the fifth factor favors a stay. Id. See also Garcia v. Adams Cnty., No. 16-CV-1977-PAB-NYW, 2017 WL 951156, at *5 (D. Colo. Mar. 8, 2017) ("[R]esolution of the motion to dismiss will clarify and streamline the claims and the proper defendants for more precise and productive discovery—conserving judicial resources and furthering the public's interest in judicial economy.").

Conclusion

The Court should stay discovery in this case until the Court rules on Defendants' forthcoming motions to dismiss.

Respectfully submitted this 11th day of October, 2023

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 11th day of October, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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