IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01951-SKC-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,
FEDERAL BUREAU OF INVESTIGATION, and
THE UNITED STATES OF AMERICA,

Defendants.

SECOND MOTION TO STAY ORDER (ECF No. 71) PURSUANT TO D.C.COLO.LCivR 30.2(b) BY THE FEDERAL DEFENDANTS, AND FOR EXPEDITED RULING

Pursuant to D.C.COLO.LCivR 30.2(b), Defendants Summey, the Federal Bureau of Investigation, and the United States (the "Federal Defendants") file this second motion to stay the Magistrate Judge's discovery order, ECF No. 71 (the "Order"), directly with the presiding District Judge, while objections to the Order are pending. The Federal Defendants also respectfully request expedited ruling on

this motion, because any ongoing discovery is a denial of Defendant Summey's qualified immunity.

INTRODUCTION

The Magistrate Judge's Order denied the defendants' motions to stay discovery and, in doing so, effectively denied qualified immunity to Defendant Summey, a defense he raises in the pending motion to dismiss, ECF No. 49 at 8-19. The defendants filed objections to the Order, ECF Nos. 73 & 75, and now, to preserve the qualified immunity defense in the interim, consistent with the procedures set forth in the Local Rules, the Federal Defendants seek a temporary stay of the Order from the District Judge. *See* D.C.COLO.LCivR 30.2(b) ("A stay of the order shall be obtained by motion filed with the magistrate judge, and if denied, then with the assigned district judge.").

The Federal Defendants do not seek a stay of this entire action. The parties will continue to conduct Westfall Act discovery and brief related issues, and the motions to dismiss are fully briefed and pending. In other words, this litigation will advance even without commencing full merits discovery at this time. In this motion, the Federal Defendants seek a stay only of general discovery permitted under the Order and only until the District Judge has a chance to rule on the defendants' objections, which implicate qualified immunity. Defendants first sought a stay of the Order from the Magistrate Judge, who denied the requests. ECF Nos. 74 & 76 (motions) & 84 (order). Now, by rule, the Federal Defendants

seek relief directly from the District Judge.

Any merits discovery that is allowed to proceed while the Court adjudicates the Federal Defendants' objections would be an irreparable affront to the qualified immunity to which Defendant Summey is entitled. Qualified immunity is an immunity from suit, not just a defense to liability. The Order permitted full merits discovery to proceed immediately, notwithstanding Summey's pending motion based on qualified immunity and before the Court has ruled on the complaint's sufficiency. The Order stands contrary to decades of Supreme Court and Tenth Circuit case law, which instructs lower courts to dismiss claims *before* allowing discovery if the plaintiff fails to state a claim of a clearly established violation of law. The Order is itself a denial of qualified immunity insofar as it subjects Defendant Summey to the burdens of full discovery, against which qualified immunity protects. The Federal Defendants contend that the District Judge should have an opportunity to review the qualified immunity implications of the Order before full discovery is allowed to proceed, and to preserve the qualified immunity defense in the interim, the District Judge should temporarily stay the Order.

CERTIFICATE OF CONFERRAL

Undersigned counsel conferred with Plaintiffs' counsel by telephone on February 2, 2024, regarding the relief sought in this motion. Plaintiffs oppose this motion.

ARGUMENT

A. A temporary stay is warranted because the Order is contrary to law and clearly erroneous.

The Order stands contrary to four decades of Supreme Court and Tenth Circuit case law about when and how much discovery should be allowed in the face of a qualified immunity defense. These cases uniformly direct trial courts to determine whether a plaintiff has properly pleaded a violation of clearly established law *before* allowing discovery on the merits of the claims. "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); *see also Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery"); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("[O]n remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery."); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) ("Discovery should not be allowed until the court resolves the threshold question whether the law was clearly established at the time the allegedly unlawful action occurred. . . . If the actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery."); *see also* ECF No. 30 at 2-5 & ECF No. 40 at 1-2 (collecting cases).

The Order did not cite any Supreme Court or Tenth Circuit case law allowing full merits discovery before the trial court resolved the issue of qualified immunity on a motion to dismiss. The Federal Defendants, however, cited controlling Tenth Circuit precedent for the proposition that even when discovery is permitted before resolving a qualified immunity defense, only discovery that is "narrow" and "limited to the issue of qualified immunity" should be allowed. *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1387 (10th Cir. 1994); *see also Stonecipher v. Valles*, 759 F.3d 1134, 1149 (10th Cir. 2014) ("If, however, the district court determines it cannot rule on the immunity defense without clarifying the relevant facts, the court 'may issue a discovery order *narrowly tailored to uncover only* those facts needed to rule on the immunity claim.'") (emphasis added, quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)); *Garrett v. Stratman*, 254 F.3d 946, 953 (10th Cir. 2001) ("Prior to resolution of qualified immunity, 'appellate jurisdiction is invoked when a defendant ... is faced with discovery that exceeds that narrowly tailored to the question of qualified immunity.' . . . Discovery designed to flesh out the merits of a plaintiff's claim before a ruling on the immunity defense . . . would certainly fall within this category. Immediate appeal would lie from these orders."); *Martin v. Cnty. of Santa Fe*, 626 F. App'x 736, 740 (10th Cir. 2015) ("discovery generally should be avoided once qualified immunity is raised," but is permissible where the plaintiff satisfies her "burden of demonstrating 'how [such] discovery will raise a genuine fact issue as to the defendants' qualified immunity claim'"); *see also* ECF

No. 30 at 7-8 & ECF No. 40 at 8-9 (collecting cases).

The correct order of operations envisioned by the Supreme Court and Tenth Circuit is unmistakable: the Court first must resolve the qualified immunity issue based on the pleadings, and, second, only if the complaint states a claim, permit discovery as needed to resolve the immunity question. This procedure also makes sense; it allows the Court to resolve "insubstantial claims" before burdening the government with expensive and time-consuming discovery. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

It is not possible to square the Order with these decisions. Permitting full discovery at this time violates the instructions that: (1) the Court first must determine that Plaintiffs have plausibly pleaded a violation of clearly established law before allowing discovery; and (2) if facts are needed to resolve the qualified immunity issue, Plaintiffs bear the burden to show that the discovery will raise a genuine issue of fact as the qualified immunity claim. Only a stay of full merits discovery will allow the Court to comply with this case law. If the Order were to stand, it would not be possible for the Court to grant dismissal to the defendants *before* discovery occurs, as directed by *Mitchell*, *Crawford-El*, *Anderson*, *Workman*, and others, or permit discovery only to resolve genuine disputes of material fact relevant to qualified immunity. Given these clear instructions from higher courts, and for the reasons explained more fully in the objection, *see* ECF No. 73 at 4-10, the Order is contrary to law and clearly erroneous.

The Order stated, and Plaintiffs have argued, that the above authority is distinguishable, in part because those cases did not expressly discuss stays of discovery. ECF No. 71 at 9-11 ("a stay request was not even at issue in *Anderson*"; "*Crawford-El* does not expressly consider whether a stay should or should not be issued"; "in that case [*Mitchell*] the issue was not whether a stay should issue"); ECF No. 83 at 5 ("Defendants could not identify any authority mandating a discovery stay"). The Order also concluded that district courts retain discretion in managing their dockets. ECF No. 71 at 11. Neither of these arguments, however, justifies proceeding with full merits discovery at this juncture. The procedure endorsed by the Supreme Court and Tenth Circuit is necessarily instructive to trial courts on *how* to exercise their discretion in qualified immunity cases, even if those cases did not arise procedurally from a denial of a stay of discovery. Here, Summey's qualified immunity defense challenges the sufficiency of Plaintiffs' pleading and is presented without the need for a factual record. Under these circumstances, the Supreme Court and Tenth Circuit instruct trial courts to exercise their discretion in favor of a stay. *See, e.g.*, *Crawford-El*, 523 U.S. at 597-98 (stating the trial court "must exercise its discretion in a way that protects the substance of the qualified immunity defense"). Because the Order is contrary to the above-cited law, the Court should grant a temporary stay here until it reviews the objections.

B. Other factors also favor a temporary stay of the Order.

D.C.COLO.LCivR 30.2(b) does not specify the standard of review courts are to use in deciding a motion to stay a discovery order. Some courts have applied the factors set forth in *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 02-cv-01934-LTB-PAC, 2006 WL 894955, *2 (D. Colo. Mar. 30, 2006). *See Silverstein v. Fed. Bureau Of Prisons*, No. 07-cv-02471-PAB-KMT, 2009 WL 5217977, at *1 (D. Colo. Dec. 29, 2009); *Shell v. Henderson*, No. 09-cv-00309-MSK-KMT, 2013 WL 950458, at *1 (D. Colo. Mar. 12, 2013). Other courts did not. *See Vreeland v. Vigil*, No. 18-cv-03165-PAB-SKC, 2019 WL 2229718, at *2 (D. Colo. May 23, 2019) (Crews, J.); *HEI Res. E. OMG Joint Venture v. Evans*, No. 09-cv-00028-MSK-BNB, 2009 WL 250364, at *2 (D. Colo. Feb. 3, 2009). Regardless, additional factors favor a stay here.

Plaintiffs' interests. Plaintiffs have a general interest in proceeding expeditiously with their case and obtaining discovery. But these interests typically do "not outweigh the importance of first determining the applicability of qualified immunity." *Boateng v. Metz*, No. 18-cv-02694-WJM-SKC, 2019 WL 13257702, at *2 (D. Colo. Mar. 15, 2019) (Crews, J.); *Ashaheed v. Currington*, No. 17-cv-03002-WJM-SKC, 2019 WL 11690136, at *2 (D. Colo. Nov. 4, 2019) (Crews, J.) (same); *Raven v. Williams*, No. 19-cv-01727-WJM-SKC, 2019 WL 4954640, at *1 (D. Colo. Oct. 8, 2019) (Crews, J.) (same). Plaintiffs also have argued that their claims of injunctive relief favor proceeding with discovery so that "members of the activist community" can "assess whether it is safe for them to protest," ECF No. 83 at 7, but this

argument is undermined by the fact Plaintiffs waited nearly two years after the underlying incidents to bring suit, suggesting no urgency in resolving the legal questions of interest to the community. Additionally, the temporary stay of the Order sought in *this* motion—merely until the Court rules on the defendants' objections—will likely last only a fraction of the time the Plaintiffs waited before filing suit and will not unduly delay or burden Plaintiffs' interests. Because the Federal Defendants do not seek a stay of the action in its entirety—parties will continue to advance the litigation regarding Westfall Act immunity, for example—the effect on Plaintiffs' interests in further diminished.

Because "appellate jurisdiction is invoked when a defendant ... is faced with discovery that exceeds" the question of qualified immunity, *Garrett*, 254 F.3d at 953, it is entirely possible that Plaintiffs' interests will be better served *with* a stay than without one. For example, if the Court were to deny the stay of discovery, the defendants would be entitled to appeal that denial to the Tenth Circuit, and any appeal likely would take longer to resolve than the pending objections or motions to dismiss. For these reasons, this factor favors a stay.

Defendants' burden. Defendants would be burdened by proceeding with discovery because Summey has "asserted the qualified immunity defense," which "serves to spare officials from unwarranted liability as well as 'demands customarily imposed upon those defending a long drawn out lawsuit,'" and is "effectively lost if a case is erroneously permitted to go to trial." *Boateng*, 2019 WL 13257702, at *2; *see*

also Ashaheed, 2019 WL 11690136, at *2 (same); *Raven*, 2019 WL 4954640, at *2 (same). "'[D]iscovery generally should be avoided once qualified immunity is raised,' unless the plaintiff demonstrates 'how [such] discovery will raise a genuine fact issue as to the defendants' qualified immunity claim.'" *Boateng*, 2019 WL 13257702, at *2. Because Summey's qualified immunity argument is based on the pleadings and documents incorporated by the complaint, no discovery is needed to rule on the threshold immunity issue. *See Tiger v. Powell*, No. 21-cv-01892-PAB-SKC, 2022 WL 20595110, at *2 (D. Colo. May 9, 2022) (Crews, J.) (a qualified immunity defense weighs in favor of a stay when "Defendants' arguments regarding qualified immunity do not hinge on inherently factual issues necessitating discovery to ferret out."). And after *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009), "the risk that applicable immunities may be disregarded, outweigh any benefit derived by allowing partial [merits] discovery during a stay" as to other parties. *Boateng*, 2019 WL 13257702, at *2. "The better course of action is to proceed with discovery once there is an understanding of which claims and Defendants will remain in the case." *Id.* This is particularly true where discovery on the qualified immunity claims overlaps to a significant degree with the other claims. *See* ECF No. 84 ("inquiry into the facts and circumstances surrounding the claims subject to qualified immunity, will necessarily overlap with claims that are not subject to qualified immunity," citing ECF No. 71 at 14).

The denial of qualified immunity cannot be undone after full merits discovery

commences. Summey's immunity from suit will have been irreversibly lost. *Mitchell*, 472 U.S. at 526 ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."); *Workman*, 958 F.2d at 335 ("qualified immunity, if successful, protects the official both from liability as well as from the ordinary burdens of litigation"). A short stay of discovery would preserve the immunity defense unless and until the Court determines that discovery must proceed, after reviewing the objections.

Defendants also have moved to dismiss all claims as to all parties, based on qualified immunity, lack of jurisdiction, and other grounds.[1] *See* ECF No. 49 (Federal Defendants' motion to dismiss, including, at pp. 8-21, qualified immunity and jurisdictional arguments for dismissal of Claims 1 and 4); *see also, generally* ECF Nos. 50, 51 & 52 (city defendants' motions to dismiss). Ultimately, no merits discovery may be needed. And because the claims against the city defendants and Federal Defendants are distinct and concern separate warrants, there is a possibility that the motions to dismiss, at the very least, could narrow the issues left for discovery. *See Tiger*, 2022 WL 20595110, at *2 (stay of discovery was warranted in part because "the Motion to Dismiss here is based on purely legal questions regarding exhaustion, statutes of limitation, and whether—as a matter of law—

[1] The underlying motions to dismiss are fully briefed. A ruling on the motions to dismiss also would resolve the issue presented here.

Plaintiff has alleged a claim upon which relief may be granted"); *Vreeland*, 2019 WL 2229718, at *2 (granting a stay pending resolution of a fully dispositive motion to dismiss). This factor strongly favors a temporary stay.

The Court's convenience. "[W]here a pending motion may dispose of an action ... a stay of proceedings may allow the Court to avoid expending resources in managing an action that ultimately will be dismissed." *Boateng*, 2019 WL 13257702, at *3. The pending motions to dismiss "may result in the dismissal of some or all of the claims in the case." *Id.* "Therefore, a stay may prevent the waste of judicial time and resources in handling discovery disputes regarding claims and parties that are subject to dismissal." *Id.* Although the parties endeavor to find agreement on discovery issues wherever possible, the parties have already needed Court intervention to resolve disagreements about the scope of Westfall Act discovery, ECF No. 82 at 1, and it is realistic to expect other disputes will arise, as the parties are not in full agreement about the terms of the proposed scheduling order. *See* ECF No. 85 at 18 § 11(a) (identifying disagreements among the parties). "Considering this case is in the early stages, . . . the interests of judicial economy weigh in favor of a stay." *Boateng*, 2019 WL 13257702, at *3; *Tiger*, 2022 WL 20595110, at *2 ("Defendants' motion may result in the resolution of this case in its entirety on questions of law, and a stay may prevent a waste of judicial time and resources in handling discovery disputes regarding claims and parties that are subject to dismissal"); *Ashaheed*, 2019 WL 11690136, at *2 (same).

Non-party interests. Plaintiffs have signaled that they will seek to take up to 20 depositions in this action, not including experts. *See* ECF No. 85 at 13, 16-17 (Plaintiffs' anticipated list of deponents). This total includes 15 depositions of non-parties, including police officers, detectives, deputy chiefs, district attorneys, the Rocky Mountain Regional Computer Forensics Laboratory, and the Office of the District Attorney for the El Paso County Combined Courts, among others. *Id.* at 16-17. Because of the potential burden on non-parties, it would be prudent to stay discovery until the Court considers the objections. This factor favors a stay.

Public interest. "[A]lthough there is a general public interest in the speedy resolution of legal disputes, there is also a strong public policy in 'avoiding unnecessary expenditures of public and private resources on litigation.'" *Boateng*, 2019 WL 13257702, at *3 (citation omitted). "Given the possibility of dismissal of the case, in whole or in part, the fifth factor weighs in favor of a stay." *Id.*; *Tiger*, 2022 WL 20595110, at *3 (same); *Ashaheed*, 2019 WL 11690136, at *3 (same); *Raven*, 2019 WL 4954640, at *2 (same).

On balance, these factors favor a temporary stay of the Order.

CONCLUSION

The federal defendants respectfully request that the Court temporarily stay the Order, ECF No. 71, to allow the Court sufficient time to consider the Federal Defendants' objections related to their original requests for a stay of discovery, ECF No. 73. This temporary stay will preserve the qualified immunity defense for

Defendant Summey while the Court reexamines the Order.

Respectfully submitted on February 2, 2024.

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CERTIFICATION REGARDING THE USE OF A.I.

No portion of this filing was drafted by artificial intelligence.

CERTIFICATE OF SERVICE

I certify that February 2, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record:

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