IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459-MJG

JOINT FILING REGARDING THE PARTIES' PROPOSED AMENDED SCHEDULES

On December 27, 2017, the Court entered a Scheduling Order that governed discovery deadlines in this litigation. ECF 100. On April 24, 2018, the Court temporarily suspended all discovery deadlines set forth in the Scheduling Order, and ordered the parties to meet and confer and file a proposed amended schedule by May 31, 2018. ECF 145. The parties conferred on May 30, 2018, but were unable to reach a joint proposal. Pursuant to that order, the parties hereby submit their proposals.[1]

I. PLAINTIFFS' POSITION

Plaintiffs propose that the deadlines set forth in the Court's Scheduling Order, ECF 100, should be amended as set forth below:

July 13	Proponent's Rule 26(a)(2) disclosures
August 10	Opponent's Rule 26(a)(2) disclosures
August 17	Reply Rule 26(a)(2) disclosures

[1] On May 4, 2018, this case was referred to the Honorable Stephanie A. Gallagher, U.S. Magistrate Judge, for all discovery disputes including scheduling matters. On May 7, 2018, this case was reassigned to the Honorable A. David Copperthite, U.S. Magistrate Judge, for all discovery disputes including scheduling matters. As such, the parties are submitting their proposals regarding amended discovery deadlines to Judge Copperthite.

August 31	Last day for filing discovery-related motions
August 31	Discovery deadline
September 13	Status hearing with Court
October 5	Last day for filing dispositive pretrial motions

Plaintiffs oppose Defendants' proposal that all discovery be stayed pending the outcome of certain motions. Plaintiffs note that the Court has already ruled that the existence of discovery disputes does not justify delay in taking other discovery, and that the filing of motions such as a motion for a protective order does not result in an extension of the discovery deadline. *See* ECF 100 at 2 ("The existence of a discovery dispute as to one matter does not justify delay in taking any other discovery."); *see also* L.R. 104.3 (Discovery to Proceed Despite Existence of Disputes).

Plaintiffs further note that this Court and the Fourth Circuit have both previously considered Defendants' multiple requests to stay this matter, and rejected such requests every time. *See, e.g.*, ECF 31; ECF 99; ECF 101. Indeed, the Court currently has Defendants' motion for a protective order seeking to preclude all discovery before it, ECF 121, and no further efforts to delay discovery are warranted.

Plaintiffs' filing of their Cross-Motion for Summary Judgment (ECF 163) is not a sufficient basis to stay discovery when Plaintiffs expressly contend that Defendants are "withholding material facts from Plaintiffs." ECF 163-2 at 3; *see Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. 2011) ("The fact that a non-frivolous motion is pending is simply not enough to warrant a blanket stay of all discovery."); *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) (reasoning motions to stay discovery "are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems."). Moreover, Defendants mischaracterize Plaintiffs' position, failing to acknowledge

"[t]he existing record, while incomplete, supports Plaintiffs' cross-motion for summary judgment, but at a minimum it reveals genuine disputes of material fact on issues central to Plaintiffs' constitutional arguments (including animus and the nature of the government's decisionmaking process), precluding summary judgment for Defendants." ECF 163-2 at 45. In support of this position, Plaintiffs filed a Rule 56(d) affidavit contemporaneously with their Cross-Motion for Summary Judgment, setting forth more than six full pages of specific evidence and discovery essential to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. ECF 163-16 at 8–14.

Finally, other courts have already rejected Defendants' argument that further discovery is unwarranted in light of the so-called "administrative record." The district courts in the related *Doe* and *Karnoski* cases have already held Plaintiffs are entitled to full discovery despite Defendants' unilateral assertion that Plaintiffs' facial constitutional challenge should be subject to the limitations of an administrative action. ECF 143-1 (explaining that because "Plaintiffs assert claims under the Fifth Amendment to the United States Constitution," the APA's limitations on discovery do not apply); ECF 143-2 ("[T[here is no reason for discovery to be confined to the administrative record" because Plaintiffs "raise direct constitutional claims.").

II. DEFENDANTS' POSITION

Defendants respectfully submit that, consistent with Federal Rules of Civil Procedure 1 and 26, the Court should not enter an amended schedule for discovery-related deadlines at this time because further discovery in this matter should be stayed until the Court resolves pending motions that will affect the scope of discovery in this case. A stay of discovery would facilitate the speedy and inexpensive resolution of this matter and would ensure that any discovery taken is proportionate to the needs of the case.

After the Court entered its Order directing the parties to file a proposed amended schedule, Dkt. No. 145, the parties filed cross-motions for summary judgment, *see* Dkt. Nos. 158, 163. Defendants argued in their motion for summary judgment that the case should be reviewed on an administrative record and that judgment should be entered for Defendants on all claims. *See* Dkt. No. 158, at 1, 2 n.1, 50. If the Court enters judgment for Defendants, or denies summary judgment but concludes that the case should be decided on the administrative record, then Plaintiffs would not be entitled to any discovery. If the Court does not enter summary judgment based on the administrative record, then any further discovery would at least be limited to any identified genuine issues of material fact.

Plaintiffs then cross-moved for summary judgment. Dkt. No. 163. By filing a cross-motion for summary judgment, Plaintiffs have affirmatively represented to the Court that "there is no genuine dispute as to any material fact," *see* Fed. R. Civ. P. 56(a), and implicitly conceded that no further discovery is necessary on these claims. Plaintiffs have failed to provide any reasoned basis for continuing to seek discovery while simultaneously claiming they are entitled to summary judgment based on an absence of any genuine material factual dispute. And this is particularly true where the Court has entered a nationwide injunction, thereby protecting Plaintiffs from any potential change in the *status quo* during the pendency of this case. *See* Dkt. No. 84. Should the Court deny summary judgment to either party on some or all claims in this case, the parties could then engage in narrowly-tailored discovery necessary to address the Court's ruling.

In addition, Defendants filed a motion for a protective order to stay discovery pending the resolution of Defendants' dispositive motions. *See* Dkt. No. 121; *see also* Dkt. No. 146. Although Plaintiffs assert that the Court has already rejected Defendants' requests to stay discovery, this case is now in an entirely different procedural posture—both parties have moved for summary

judgment representing that there is no genuine dispute as to any material fact. Moreover, in Defendants' motion for a protective order, Defendants also argued that because the new policy resulted from an administrative process by the Department of Defense, any further litigation should be confined to the administrative record prepared by the Department. If the Court agrees with Defendants on this issue, then there would be a presumption against any discovery.

Also, as reflected in the three related cases in other jurisdictions challenging the Department of Defense's new policy, without a stay of discovery, it is highly likely that the parties will engage in substantial motions practice concerning, among other issues, the application of Executive privilege. For example, the parties are currently engaged in briefing Plaintiffs' motion to compel materials withheld under the deliberative process privilege, and, if Plaintiffs file that motion, Defendants will likely file a motion for a protective order to preclude discovery directed at the President and at information concerning presidential communications and deliberations. A stay of discovery pending the resolution of the cross-motions for summary judgment could obviate the need for the Court to resolve these discovery disputes raising important separation-of-powers concerns.

Accordingly, before requiring the parties to engage in burdensome discovery raising substantial separation-of-powers concerns, the Court should first resolve the parties' cross-motions for summary judgment. Only if aspects of the case remain after resolution of summary judgment should the Court require the parties to develop a discovery schedule that is tailored to meet the needs of the case. Such a case management approach best achieves the goal of a "just, speedy, and inexpensive determination" of this action, as required by Federal Rule of Civil Procedure 1, as well as ensures that any discovery taken is proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

* * *

WHEREFORE, the parties respectfully request that the Court enter an order setting forth its ruling on the amended procedural schedule.

Dated: May 31, 2018

/s/ Peter J. Komorowski

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