

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, *et al.*,  
Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, *et al.*,  
Defendants.

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**STATE OFFICIALS' MOTION TO STAY ALL DISCLOSURES AND DISCOVERY**

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Defendants Aubrey Elenis, Director of the Colorado Civil Rights Division, in her official and individual capacities (the “Division Director”), Anthony Aragon, Miguel “Michael” Rene Elias, Carol Fabrizio, Charles Garcia, Rita Lewis, and Jessica Pocock, in their official capacities as members of the Colorado Civil Rights Commission (collectively, “Commissioners” or the “Commission”), Cynthia H. Coffman, in her official capacity as Colorado Attorney General (the “Attorney General”), and John Hickenlooper, in his official capacity as Colorado Governor (the “Governor”) (collectively, “State Officials”), move to stay all disclosures and discovery.

**D.C. COLO. Civ. R. 7.1(a) CERTIFICATION**

Undersigned counsel conferred in good faith with counsel for Plaintiffs about the relief requested by this Motion and is authorized to represent that Plaintiffs oppose the same.

**BACKGROUND**

Plaintiff Masterpiece Cakeshop, Inc. (the “bakery”), which is owned by Plaintiff Jack Phillips, was the respondent to an earlier third-party charge of discrimination in a place of public accommodation filed with the Colorado Civil Rights Division (“Division”) in 2012. After the full

adjudication of the 2012 charge, the United States Supreme Court issued a decision on June 4, 2018, holding that hostility on the part of *former* Commissioners was “inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral towards religion.” *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018). As a result, the Court did not reach the merits of the bakery and Mr. Phillips’ challenge to the former Commissioners’ decision holding that they violated the Colorado Anti-Discrimination Act, §§ 24-34-301 to –804, C.R.S. (2018) (“CADA”). *Id.*, at 1728, 1723-24, 1732.

On June 28, 2018, the Division Director found probable cause for a *new* charge of discrimination filed against the bakery and Mr. Phillips by a *different* member of the public. Doc. 1, ¶¶ 175, 195-202. In June 2017, the bakery refused to make a birthday cake for Autumn Scardina because “the cake was ‘to celebrate a sex-change from male to female.’” Doc. 1, ¶¶ 179, 184; Doc. 1-1, p. 2-3. After being refused service, Ms. Scardina filed a charge of discrimination based on sex and transgender status with the Division in July 2017, which in turn notified the bakery and investigated the charge to determine whether probable cause exists. Doc. 1, ¶¶ 192-93.

After the Division Director’s probable cause finding but before the Commission filed a Notice of Hearing and Formal Complaint in *Scardina v. Masterpiece Cakeshop Inc., et al.*, Colorado Office of Administrative Courts Case No. CR 2018\_\_\_\_\_, on October 9, 2018 [*see* Doc. 43-1], Plaintiffs filed their Verified Complaint in this Court. *See* Doc. 1, p. 51. In it, they assert claims under 42 U.S.C. § 1983 against the State Officials and CADA for allegedly violating their First and Fourteenth Amendment constitutional rights based on several as-applied

and facial theories. *Id.*, ¶¶ 280-335. As redress, Plaintiffs seek declaratory and injunctive relief against all of the State Officials, actual and punitive damages against the Division Director, and nominal damages against each of the State Officials. *Id.*, Prayer for Relief, ¶¶ 1-11.

### **PENDING RULE 12(b)(1) MOTION TO DISMISS**

The State Officials filed a Rule 12(b)(1) motion to dismiss on October 10, 2018. Docs. 43, 43-1. In it, they asserted that this Court lacks subject matter jurisdiction over Plaintiffs' claims for three reasons. *First*, there is an ongoing civil enforcement proceeding by the Commission to decide the 2017 discrimination charge alleging that the bakery and Mr. Phillips violated CADA. As a result, this Court must abstain from exercising jurisdiction over Plaintiffs' claims for equitable relief here based on the doctrine articulated in *Younger v. Harris*, and also should abstain under the *Pullman*, *Burford*, and *Colorado River* doctrines.

*Second*, Plaintiffs' claims are barred by various immunities. Specifically, their damages claims against the Division Director are barred by absolute quasi-prosecutorial immunity, or alternatively by qualified immunity. Their claims for equitable relief against the Attorney General and Governor are barred by Eleventh Amendment immunity due to the lack of personal participation by either in the civil enforcement action related to the 2017 discrimination charge. And their claims for nominal damages against each of the Commissioners, the Attorney General, and the Governor are likewise barred by Eleventh Amendment immunity due to the fact that each is named only in her or his official capacity.

And *third*, Plaintiffs lack standing to challenge the selection criteria for Commissioners in section 24-34-303(1)(b)(I)-(III) of CADA. The Verified Complaint fails to allege that any, much less a majority, of the Commissioners named as Defendants here were appointed under those criteria, so they have not suffered an injury-in-fact related to the criteria.

## PROPOSED JOINT SCHEDULING ORDER

In preparing their proposed Joint Scheduling Order [Doc. 45], counsel for the parties engaged in extensive conferrals about the scope of the claims and defenses at-issue in this case, as well as the extent of discovery needed to develop and prove the same. Despite being in complete agreement that “this case primarily involves disputed questions of law” [Doc. 45, ¶ 6(h)], Plaintiffs not only oppose staying disclosures and discovery until this Court has ruled on the Rule 12(b)(1) motion to dismiss, but also oppose the reasonable *per side* limitations on the number of interrogatories, requests for production, and requests for admission proposed by the State Officials to achieve proportionality in compliance with Rule 26. *See* Doc. 45, ¶ 11(a). Besides wanting to be able to propound “the full number of discovery requests available under the Federal Rules of Civil Procedure,” Plaintiffs also “do not agree to refrain from pursuing public-records requests under the Colorado Open Records Act.” *Id.* In fact, they already are doing so with respect to records held by the Governor, Attorney General, and the Colorado Civil Rights Division and Commission. *See* Doc. 46—State Officials’ Motion for Order Prohibiting Plaintiffs’ Use of Open Records Laws to Circumvent Discovery. Finally, despite the dearth of factual allegations in the Verified Complaint about the Attorney General and Governor’s personal participation in any of the transactions or occurrences giving rise to their claims, Plaintiffs insist on being able to depose both statewide elected officials. *See* Doc. 45, ¶ 11(a).

## ARGUMENT

### I. Standard of review.

The Federal Rules of Civil Procedure (“Rules”) govern, *inter alia*, the timing and manner in which the parties to an action obtain information about disputed facts, claims, and defenses from each other and third parties. *See e.g.*, Fed. R. Civ. P. 1, 16, 26, 30, 33-34, and 36. Coupled

with any discovery orders specific to the civil action, the Rules and a court's orders operate to control the exchange of information and documents between the parties. In many cases, they also operate to protect confidential or privileged information by limiting access to and the use of documents obtained in discovery, and to protect parties and third parties from overly burdensome or harassing discovery requests. *See* Fed. R. Civ. P. 16, 26(c). By their own terms, the Rules must "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. "Generally, '[c]ontrol of discovery is entrusted to the sound discretion of the trial courts," and a trial court's ruling on discovery motions "will not be disturbed absent abuse of discretion.'" *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995) (quoting *Martinez v. Schock Transfer and Warehouse Co.*, 789 F.2d 848, 850 (10th Cir. 1986)).

**II. All disclosures and discovery should be stayed until this Court decides the Rule 12(b)(1) motion to dismiss.**

In this case, Plaintiffs are eager to subject the State Officials to the full brunt of all discovery available under the Rules, as well as to unlimited public records requests in complete circumvention of any discovery limits. They appear to have no regard for either Rule 26's proportionality requirement or Rule 1's mandate about its construction. Fortunately, federal courts recognize that staying discovery and disclosure deadlines may be appropriate where, as here, an early dispositive motion may fully resolve the case. *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved."); *Colo. ex rel. Suthers v. Western Sky Fin., L.L.C.*, No. 11-cv-00887-RED-KMT, 2011 WL 2457861, \*3 (D. Colo. June 20, 2011) (citing *Vivid Techs.*); *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 05-cv-01934-LTB-PAC, 2006 WL 894955, \*6 (D. Colo. March 30, 2006) (temporarily

staying case “to allow for the potential of a ruling on the motion to dismiss”).<sup>1</sup> In fact, the State Officials’ pending motion to dismiss challenges this Court’s jurisdiction—a potentially dispositive issue that counsels even more heavily in favor of staying discovery. *See Castro v. Holmberg*, No. 14-cv-00791-LTB-KMT, 2014 WL 4122175, \*1 (D. Colo. Aug. 21, 2014) (“Courts have routinely recognized that discovery may be inappropriate where the court’s jurisdiction is at issue”); *Edwards v. Zenimax Media, Inc.*, No. 12-cv-00411-WYD-KLM, 2012 WL 1801981, \*1–2 (D. Colo. May 17, 2012) (similar, collecting cases).

Whether to stay all disclosures and discovery is within this Court’s sound discretion because “the 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.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The Rules, while not expressly contemplating a stay of discovery, permit the Court to “issue an order to protect a party ... from annoyance, embarrassment, oppression, or undue burden or expense,” including “forbidding the disclosure or discovery.” Fed. R. Civ. P. 26(c)(1)-(c)(1)(A). Federal courts have interpreted this rule to authorize a stay of discovery to fully resolve a dispositive motion. *See Western Sky*, 2011 WL 2457861, \*1–2 (citing Rule 26).

In considering a stay, courts analyze: (1) the plaintiff’s interest in proceeding expeditiously with the civil action and the potential prejudice to the 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. *Western Sky*, 2011 WL 2457861, \*3 (citing *FDIC v. Renda*, No. 85-2216-0, 1987 WL 348635, \*2 (D. Kan. Aug. 6, 1987)); *String Cheese*,

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<sup>1</sup> All unreported Westlaw and Lexis decisions cited herein are attached as Exhibit A.

2006 WL 894955, \*4–5 (same). In this case, each factor weighs in favor of staying all disclosures and discovery.

Plaintiffs’ Interest/Prejudice: Contrary to their likely assertion “that discovery on the issue of bad faith [needs to] begin now,” [Doc. 45, ¶ 11(a)], Mr. Phillips signed a declaration under penalty of perjury that the Verified Complaint “is true and correct to the best of [his] knowledge” on August 14, 2018. Doc. 1, p. 52. To do so, he must have had a specific, factual basis for alleging bad faith on the part of the State Officials *before* filing the Verified Complaint on that date, so no discovery should now be necessary to overcome the motion to dismiss. *See id.*, ¶¶ 8, 204, 209, and 278. Of course, the likely reason why Plaintiffs want to commence discovery into bad faith at this time is because the allegations in the Verified Complaint are wholly conclusory. *See id.* But nearly forty years ago, the U.S. Supreme Court held “that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.” *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). This Court should hold the same. And given Plaintiffs’ agreement that “this case primarily involves disputed questions of law,” [Doc. 45, ¶ 6(h)], any legitimate interest in proceeding with discovery is minimal. Finally, Plaintiffs will suffer no prejudice from staying disclosures and discovery until after the motion to dismiss is resolved because, in their proposed joint Scheduling Order, “[t]he parties agree[d] to preserve and maintain all electronic records, including emails and other electronic documents, in their current form.” Doc. 45, ¶ 6(g). Federal courts in this jurisdiction have stayed discovery where, as here, the parties have agreed to preserve discoverable documents throughout the course of the litigation. *See Baca v. Hickenlooper*, No. 16-cv-02986-WYD-NYW, \*10 (D. Colo. May 24, 2017) (attached as Exhibit B). This Court should do the same.

*Burden on Defendants*: If a stay is not granted, the State Officials will be greatly burdened. It is well-established that pretrial discovery imposes unique burdens on government official defendants:

If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to [the burdens of litigation discovery].

*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); *see also Fitzgerald*, 102 S. Ct. 2737–38 (“Judicial inquiry into subjective motivation” of government officials “may entail broad-ranging discovery” which “can be particularly disruptive of effective government.”). For these reasons, “[i]mmunity provisions, whether qualified, absolute or pursuant to the Eleventh Amendment, are meant to free officials from the concerns of litigation, including avoidance of disruptive discovery.” *Ankeney v. State*, No. 14-cv-00007-MSK-KMT, 2014 WL 1363940, at \*1 (D. Colo. Apr. 7, 2014) (citations omitted). The same reasoning applies where, as here, government officials assert that *Younger* abstention is appropriate. *See Maynard v. Colorado Supreme Court Office of Attorney Regulation Counsel*, No. 09-cv-02052-WYD-KMT, 2010 WL 231555, at \*1 (D. Colo. Jan. 13, 2010) (granting a motion to stay discovery based on government officials’ motion to dismiss based on *Younger*) (citations omitted).

The burden imposed on the State Officials here is especially immense. For just the Division Director to fulfill Plaintiffs’ recent broad open records request—which is subject to a separate motion pending with this Court—the Division will incur more than 1,600 hours of staff time to retrieve and review potentially responsive records. *See Docs. 46, 46-4* (letter providing

cost estimate of \$41,100 at \$25 per hour to fulfill open records request). The burden and expense imposed by their anticipated discovery requests will be even greater because litigation costs are not similarly capped. And that is for just one of the nine named defendants. Imposing these immense burdens on all of the State Officials will unduly detract from the performance of their official duties, contrary to binding Supreme Court precedent. *Ashcroft*, 129 S. Ct. at 1953.

Given Plaintiffs' zeal for subjecting the State Officials to all manner of discovery available under the Rules, as well as to unlimited public records requests, this factor weighs heavily in favor of a stay. A stay is therefore warranted to protect the State Officials from having to engage in burdensome disclosures and discovery that ultimately may be unnecessary. *See String Cheese*, 2006 WL 894955, \*4 (finding that "subjecting a party to discovery when a motion to dismiss ... is pending may subject him to undue burden or expense").

*Convenience to the Court*: The convenience to the Court will be improved if discovery and disclosures are stayed. Staying disclosures and discovery on claims that may well be dismissed will relieve this Court from having to needlessly go to the trouble of overseeing scheduling issues and adjudicating discovery disputes. *See Nguyen v. Am. Family Mut. Ins. Co.*, No. 15-cv-00639-WJM-KLM, 2015 U.S. Dist. LEXIS 106643, \*4 (D. Colo. Aug. 13, 2015) ("[I]t is certainly more convenient for the Court to stay discovery until it is clear that the case will proceed."); *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 5 (D.D.C. 2005) (staying discovery pending decision on a dispositive motion that would fully resolve the case "furthers the ends of economy and efficiency, since if [the motion] is granted, there will be no need for [further proceedings].").

*Interests of Non-Parties*: The interests of non-parties also militate in favor of staying all discovery and disclosures. If discovery proceeds, the State Officials anticipate needing to depose

the member of the public, Autumn Scardina, who filed the CADA complaint against the bakery, as well as the two non-party bakery employees who allegedly refused to serve Ms. Scardina. Doc. 45, ¶ 9(e). Yet this burden imposed on Ms. Scardina and the bakery employees will be for naught if the State Officials' pending motion to dismiss is eventually granted. *See Fed. Deposit Ins. Corp. v. Banc of Am. Funding Corp.*, No. 14-cv-00418-PAB-MJW, 2014 WL 1466721 (D. Colo. Apr. 15, 2014) (granting stay of discovery because “[n]on-parties could be unnecessarily burdened by discovery requests via subpoenas and/or depositions if the soon-to-be-filed motion to dismiss is granted”). As a result, this factor weighs in favor of staying disclosures and discovery.

Public Interest: The public has an interest in the “efficient and just” resolution of this case. *Nguyen*, 2015 U.S. Dist. LEXIS 106643, \*5. “Avoiding wasteful efforts by the Court and litigants serves this interest.” *Id.* A stay will serve the public interest because “the possibility that unnecessary expenditures of public and private resources on litigation will be minimized,” while “the probability that judicial resources will ultimately be conserved by addressing dispositive issues early the litigation” and “that both judicial and attorney resources will be conserved by clarifying and resolving disputed legal issues at the earliest possible time” will be increased. *Samuels v. Baldwin*, No. 14-cv-02588-LTB-KLM, 2015 WL 232121, \*3 (D. Colo. Jan. 16, 2015). This factor therefore favors granting a stay of all disclosures and discovery.

## CONCLUSION

Accordingly, because all five applicable factors favor a stay, the State Officials respectfully request that this Court enter an Order staying all disclosures and discovery pending the Court's resolution of their Rule 12(b)(1) motion to dismiss.

DATED: October 23, 2018.

CYNTHIA H. COFFMAN  
Attorney General

*s/ LeeAnn Morrill*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 23, 2018, I served a true and complete copy of the foregoing **STATE OFFICIALS' MOTION TO STAY ALL DISCLOSURES AND DISCOVERY** upon all counsel of record and parties who have appeared in this matter through ECF or as otherwise indicated below:

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2011 WL 2457861

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United States District Court, D. Colorado.

State of COLORADO ex rel. John W.  
SUTHERS, Attorney General for the State of  
Colorado, and Laura E. Udis, Administrator,  
Uniform Consumer Credit Code, Plaintiffs,  
v.  
WESTERN SKY FINANCIAL, L.L.C.,  
and Martin W. Webb, Defendants.

Civil Action No. 11-cv-00887-REB-KMT.

|  
June 20, 2011.

**Attorneys and Law Firms**

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Defendants.

**ORDER**

KATHLEEN M. TAFOYA, United States Magistrate  
Judge.

\*1 This matter is before the court on “Plaintiffs’ Partially  
Unopposed Motion to Stay Discovery and Related  
Matters Pending Remand” (Doc. No. 24 [Mot.], filed June  
10, 2011). Defendants filed their Response on June 17,  
2011. (Doc. No. 28 [Resp.] )

In their Motion, Plaintiffs request that discovery and  
related matters in this case be stayed pending a ruling on  
their Motion to Remand filed May 20, 2011. Defendants  
agree that discovery should be stayed but request that the  
parties be required to exchange initial disclosures and that  
the Scheduling Conference proceed as set.

The Federal Rules of Civil Procedure do not expressly  
provide for a stay of proceedings. See *String Cheese  
Incident, LLC v. Stylus Shows, Inc.*, 02-CV-01934-LTB-  
PAC, 2006 WL 894955, at \*2 (D.Colo. March 30, 2006)

(unpublished). 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(a).

A motion to stay discovery is an appropriate exercise of  
this court's discretion. *Landis v. N. Am. Co.*, 299 U.S. 248,  
254–255, 57 S.Ct. 163, 81 L.Ed. 153 (1936). “The 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.” *Id.* (citing *Kansas  
City S. Ry. Co. v. United States*, 282 U.S. 760, 763, 51 S.Ct.  
304, 75 L.Ed. 684 (1931)).

Indeed, “a court may decide that in a particular case  
it would be wise to stay discovery on the merits until  
[certain challenges] have been resolved.” 8A Charles Alan  
Wright, Arthur R. Miller & Richard L. Marcus, *Federal  
Practice and Procedure* § 2040, 198 (3d ed.2010); see also  
*Vivid Techs., Inc. v. Am. Sci. & Eng'r, Inc.*, 200 F.3d  
795, 804 (Fed.Cir.1999) (“When a particular issue may be  
dispositive, the court may stay discovery concerning other  
issues until the critical issue is resolved.”).

A stay of all discovery is generally disfavored. See *Chavez  
v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007  
WL 683973, at\*2 (D.Colo. Mar. 2, 2007) (unpublished).  
Nevertheless, a stay may be appropriate if “resolution of  
a preliminary motion may dispose of the entire action.”  
*Nankivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 692  
(M.D.Fla.2003). When considering a stay of discovery,  
the court may consider and weigh: (1) the plaintiff's  
interests 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. See *FDIC v. Renda*, No. 85–

2011 WL 2457861

2216–O, 1987 WL 348635, at \*2 (D.Kan. Aug.6, 1987) (unpublished) (citing cases).

\*2 In weighing the factors for determination of the propriety of a stay, the court finds that a stay of discovery is appropriate here. The motion to stay discovery is unopposed. Plaintiffs have filed a motion to remand, arguing the defendants improperly removed the case. Additionally, in their Motion to Dismiss (Doc. No. 9), Defendants assert they are entitled to tribal immunity. Thus, a stay of discovery favors both parties. The court also considers its own convenience, the interests of non-parties, and the public interest in general. None of these factors prompt the court to reach a different result.

Defendants request that the parties be required to exchange initial disclosures. They argue that the plaintiffs' Complaint is devoid of any specific facts showing a basis to bring this action, and that they are entitled to know the factual basis of the plaintiffs' action. Whether the case proceeds in this Court or in the Colorado state court, the parties are required to exchange initial disclosures. *See* Fed.R.Civ.P. 26(a)(1) and Colo. R. Civ. P. 26(a)(1). The court sees no reason to delay this requirement.

Defendants also request that the Scheduling Conference set for June 29, 2011, proceed so the parties may have an

opportunity to address the posture of this case in light of the defendants' asserted immunity and defenses. The court finds, in light of the stay of discovery, there is no need to hold a Scheduling Conference in which the court normally would set discovery and other case-related deadlines.

Therefore, it is

**ORDERED** that “Plaintiffs' Partially Unopposed Motion to Stay Discovery and Related Matters Pending Remand” (Doc. No. 24) is **GRANTED in part and DENIED in part**. Discovery in this case, except for exchange of Fed.R.Civ.P. 26(a)(1) initial disclosures, is **STAYED** until ruling on the Motion to Remand or further order of the court. The parties shall comply with the mandatory disclosure requirements of Fed.R.Civ.P. 26(a)(1) on or before **June 27, 2011**. The Scheduling Conference set for June 29, 2011, is **VACATED**. The parties shall file a status report in this case within ten days of ruling on the Motion to Remand if the matter is not remanded to the Denver District Court.

#### All Citations

Not Reported in F.Supp.2d, 2011 WL 2457861

2006 WL 894955

Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

STRING CHEESE INCIDENT, LLC.,  
d/b/a Baseline Ticketing, a Colorado  
limited liability company, Plaintiff(s),

v.

STYLUS SHOWS, INC., d/b/a The Shakedown  
Campout & Music Festival, a Florida corporation;  
Hal Abramson, individually, Peter Vaughn Shaver,  
Esq., Haver & Associates, an Oregon law firm;  
and John Does Nos., I through X., Defendant(s).

No. 1:02-CV-01934-LTB-PA.

March 30, 2006.

#### Attorneys and Law Firms

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Hal R. Abramson, Rockville, MD, pro se.

Patrick Dale Tooley, Dill, Dill, Carr, Stonbraker &  
Hutchings, PC, Denver, CO, for Defendants.

ORDER Granting in Part and Denying in Part Shaver  
and Haver & Associates' Motion for Stay of Discovery

COAN, Magistrate J.

\*1 In this diversity case, plaintiff alleges, among other  
claims, that defendant Shaver, an Oregon attorney,  
misrepresented defendant Shakedown's financial status in  
connection with a music festival to be held in Oregon.  
The case was referred to the undersigned for pretrial case  
management on November 16, 2005

I.

According to its statement in the Scheduling Order,  
plaintiff Baseline contracted to sell tickets for Shakedown  
for the Oregon music festival, but became concerned  
about Shakedown's financial viability after defendants  
Abramson and Stylus Shows began demanding unusual

advances on ticket sales revenues. Baseline asserts that,  
throughout the relevant time period, Shaver continually  
assured Baseline that Shakedown was fully capitalized.  
The music festival eventually was cancelled because  
defendants Abramson and Stylus allegedly did not pay the  
amount the venue for the festival required.

At the Scheduling Conference, Shaver and Haver verbally  
moved for a stay of discovery, which was granted as  
to Haver only pending ruling on its motion to dismiss.  
See Scheduling Order, Doc. # 24 at 3. The day before,  
on January 31, 2006, Shaver and Haver had moved for  
a stay of discovery in writing, see Doc. # 23, and the  
motion was referred to the undersigned on February  
6, 2006. That motion, defendants Shaver and Haver &  
Associates' (Haver) Motion to Stay Discovery Pursuant to  
Rule 26(c), Doc. # 23, is the matter now before the Court.

Shaver and Haver argue that all discovery in this case  
should be stayed pending resolution of their motion to  
dismiss for lack of personal jurisdiction. They also claim  
that discovery directed to Shaver and his law firm would  
risk the disclosure of privileged information, see Reply at  
2, and that they would be prejudiced by becoming subject  
to the burden and expense of litigation even though the  
court has not yet ruled on the pending motion to dismiss.  
They ask that all disclosures and discovery be stayed until  
the court has determined whether it has jurisdiction over  
Shaver and Haver.

Plaintiff objects to any stay, contending that defendants  
have failed to cite any authority on point that would  
authorize a broad stay of discovery, and that a discovery  
stay would only be appropriate if the case were fully  
concluded as a result of ruling on the motion to dismiss,  
relying upon *Greeley Publishing Co. v. Herget*, 233 F.R.D.  
607, 2006 WL 305510 (D.Colo.2006)(internal citation  
omitted). Plaintiff contends that: 1) the case will not  
be concluded by a ruling on these defendants' motion  
to dismiss because even if they are dismissed, plaintiff  
will continue its claims against the other defendants; 2)  
discovery will aid in responding to the issues in defendants'  
motion to dismiss; and 3) discovery will not be unduly  
wasteful or burdensome. Plaintiff also claims that Shaver's  
actions in Colorado are clearly sufficient to establish  
personal jurisdiction and that, because his actions are  
imputed to the law firm of Haver & Associates, Haver  
also should remain as a defendant. See Pl. Resp. at 2-

3. Finally, plaintiff claims prejudice if discovery is stayed indefinitely.

## II.

\*2 The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. Rule 26(c) does however, permit the court to “make any order which justice requires to protect a party ... from annoyance, embarrassment, oppression, or undue burden or expense.” See Fed.R.Civ.P. 26(c)(2005). I find that subjecting a party to discovery when a motion to dismiss for lack of personal jurisdiction is pending may subject him to undue burden or expense, particularly if the motion to dismiss is later granted.

In order to evaluate Shaver and Haver's motion for stay, I may weigh the following interests: (1) plaintiff's interests 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. See e.g., *FDIC v. Renda*, No. 85–2216–O, 1987 WL 348635, at \*2 (D.Kan.987)(unpublished disposition).

In this action, discovery began on or about February 1, 2006 and the discovery deadline is September 15, 2006. Shaver and Haver's motion to dismiss was filed December 20, 2005 and is now fully briefed. Applying the *Renda* factors, I find that: 1) to grant defendants' motion could delay the proceedings for an unknown period of time until there is a ruling on the pending motion and that the delay would significantly impact and prejudice plaintiff's “right to pursue [its] case and vindicate its claim expeditiously” *id.* (citing *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers*, 87 F.R.D. 53, 56 (E.D.Pa.1980); 2) defendants, however, also would undoubtedly be prejudiced if they were forced to engage in discovery if the court eventually granted their motion to dismiss; 3) it is generally the court's practice not to stay cases; 4) if the motion for stay were denied, an *in camera* review of allegedly privileged documents as well as a suitable protective order could ensure that certain privileged documents would not be

produced and that the confidentiality of any privileged materials ordered produced would be protected; 5) the court is inconvenienced if matters proceed in a piecemeal fashion which would occur if discovery proceeded against some, but not all, defendants; 6) if discovery were to be completed between plaintiff and the other defendants before the Shaver and Haver motion to dismiss is ruled on, all parties would have to engage in a second round of discovery with Shaver and Haver if their motion to dismiss is denied; and 7) there is no evidence before me that third parties or the public interest are or may become involved in this case. Finally, I agree with plaintiff's arguments only to the extent that, even if discovery were stayed against Shaver and Haver and their motion to dismiss is granted, the case would proceed against the remaining defendants.

After considering counsels' arguments and the *Renda* factors, I find that a thirty day stay to allow for the potential of a ruling on the motion to dismiss will not unduly prejudice either side. Thereafter, however, more factors weigh in favor of proceeding with discovery rather than imposing either an indefinite stay of all discovery or a stay in favor of Shaver and Haver & Associates.

## IV.

\*3 Accordingly, for the reasons stated, it is hereby

ORDERED that defendants Shaver and Haver & Associates' Motion to Stay Discovery Pursuant to Rule 26(c), Doc. # 23, is *granted in part* and *denied in part* as follows. It is further

ORDERED that discovery against Shaver and Haver & Associates only is *stayed* until April 30, 2006 and that the stay is *lifted* as of May 1, 2006. It is further

ORDERED that, to the extent they have not previously done so, Shaver and Haver will produce Rule 26(a)(1) disclosures to opposing counsel no later than May 10, 2006.

### All Citations

Not Reported in F.Supp.2d, 2006 WL 894955

2014 WL 4122175

Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

George A. CASTRO, Plaintiff,

v.

Kristen P. HOLMBERG, Joel  
Mecklenburg, Aronowitz & Mecklenburg,  
P.C., US Bank, N.A., Defendants.

Civil Action No. 14-cv-00791-LTB-KMT

Signed August 21, 2014

**Attorneys and Law Firms**

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Catherine Ann Hildreth, Aronowitz & Mecklenburg,  
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CO, for Defendants.

**ORDER**

Kathleen M. Tafoya, United States Magistrate Judge

\*1 This matter is before the court on the “Opposed Motion to Stay Discovery” filed by Defendants Aronowitz, Mecklenburg, Aronowitz & Mecklenburg, LLP, and U.S. Bank N.A. (Doc. No. 45, filed July 7, 2012.) Defendant Holmberg was granted leave to join the Motion to Stay on July 7, 2014. (See Doc. No. 46.) For the following reasons, the Motion is GRANTED.

In their Motion to Stay, Defendants seek to stay initial disclosures, expert disclosures, and pretrial disclosures pending ruling on their motions to dismiss. The motions to dismiss assert that Plaintiff’s Complaint is properly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). (See Doc. Nos. 22 & 25.)

A motion to stay discovery pending determination of a dispositive motion is an appropriate exercise of this court’s discretion. *Landis v. North American Co.*, 299 U.S. 248, 254–255 (1936). The 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. *Kansas City S. Ry. Co. v. United States*, 282 U.S. 760, 763 (1931).

The underlying principle governing whether to grant or deny a stay is that “[t]he 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 1477, 1484 (10th Cir.1983) (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir.1971)). In other words, stays of the normal proceedings of a court matter should be the exception rather than the rule. As a result, stays of all discovery are generally disfavored in this District. *Chavez v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, No. 2007 WL 683973, at \*2 (D.Colo. Mar. 2, 2007) (citation omitted).

Nevertheless, “a court may decide that in a particular case it would be wise to stay discovery on the merits until [certain challenges] have been resolved.” 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2040, at 198 (3d ed.2010). Courts have routinely recognized that discovery may be inappropriate where the court’s jurisdiction is at issue. *Gilbert v. Ferry*, 401 F.3d 411, 415–16 (6th Cir.2005) (finding stay permissible pending ruling on a dispositive motion asserting a jurisdictional issue); *Democratic Republic of Congo v. FG Hemisphere Assocs., LLC*, 508 F.3d 1062, 1064 (D.C.Cir.2007) (noting that the reason jurisdictional defenses should be raised at the outset is to avoid unnecessary litigation).

Indeed, a lack of subject matter jurisdiction may be asserted at any time by the court either at the trial or appellate level, and that has been done on innumerable occasions at all levels of the federal judiciary. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). A Rule 12(b)(1) challenge is usually among the first issues resolved by a district court because if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined by the judge. *Id.* As such, decisions from this District have concluded that stays are generally favored when a jurisdictional defense under Rule 12(b)(1) is asserted. See *Weatherspoon v. Miller*, No. 11-cv-00312–

REB-MEH, 2011 WL 1485935, at \*2 (D.Colo. Apr. 19, 2011).

\*2 When considering a stay of discovery, this court has considered the following factors: (1) the plaintiff's interests 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, LLC v. Stylus Shows, Inc.*, No. 02-cv-01934-LTB-PA, 2006 WL 894955, at \*2 (D.Colo. Mar. 30, 2006) (citing *FDIC v. Renda*, No. 85-2216-O, 1987 WL 348635, at \*2 (D.Kan. Aug. 6, 1987)).

Turning to the *String Cheese Incident* factors, the court acknowledges that Plaintiff has an interest in proceeding expeditiously with this case. However, the court finds that this interest is overcome by the burden Defendants might face if they were forced to proceed with discovery only to have the case dismissed for lack of subject matter jurisdiction. *Cf. String Cheese*, 2006 WL 894955, at \*2 (finding “that subjecting a party to discovery when a motion to dismiss for lack of personal jurisdiction is pending may subject him to undue burden or expense, particularly if the motion to dismiss is later granted.”). For similar reasons, the court finds its own convenience

also favors a stay; any inconvenience in rescheduling the docket is outweighed by the potential waste of judicial resources if discovery were to proceed in the absence of jurisdiction. *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C.2005) (“A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.”) (internal quotation omitted).

Finally, the interests of non-parties and the public do not prompt the court to reach a different result. Therefore, having balanced the five *String Cheese* factors, the court finds that a stay of discovery is “Opposed Motion to Stay Discovery” filed by Defendants Aronowitz, Mecklenburg, Aronowitz & Mecklenburg, LLP, and U.S. Bank N.A. (Doc. No. 45) is **GRANTED**. All discovery in this matter is hereby **STAYED** pending ruling on the motions to dismiss. The Scheduling Conference set for September 2, 2014, is **VACATED**. The parties shall file a joint status report within ten days of a ruling on the motions to dismiss to advise if the Scheduling Conference should be reset.

#### All Citations

Not Reported in Fed. Supp., 2014 WL 4122175

2012 WL 1801981

Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

Landis EDWARDS, individually and on behalf  
of all others similarly situated, Plaintiff,

v.

ZENIMAX MEDIA, INC., a Delaware corporation,  
and Bethesda Softworks, LLC, a Delaware  
limited liability company, Defendants.

Civil Action No. 12-cv-00411-WYD-KLM.

|  
May 17, 2012.

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### ORDER

KRISTEN L. MIX, United States Magistrate Judge.

\*1 This matter is before the Court on **Defendants' Motion to Stay Discovery and Incorporated Memorandum of Law and Request for Expedited Hearing** [Docket No. 24; Filed April 25, 2012] (the "Motion"). On April 26, 2012, the Court ordered expedited briefing on the Motion [# 26]. Plaintiff filed a Response in opposition to the Motion on May 8, 2012[# 28], and Defendants submitted a Reply on May 14, 2012[# 29]. The Motion is thus ripe for review.

#### I. Background

This matter is a putative class action lawsuit concerning an alleged defect in a video game titled *The Elder Scrolls IV: Oblivion*. See *Compl.*, [# 3] at 2. In brief, Plaintiff contends that the alleged defect causes the game to shut down prematurely, thereby "significantly decreas[ing] the value of the *Oblivion* video game to consumers." *Id.* at

7. The Complaint contains class allegations, and asserts violations of the Colorado Consumer Protection Act, breach of the implied warranty of merchantability, fraud by omission, and unjust enrichment. See [# 3].

Defendants removed this action from Denver County District Court on February 16, 2012, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(d). See [# 1]. On the same date, Defendants responded to the Complaint with a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(2) and (6).[# 5]. Defendants additionally filed a Motion to Strike Plaintiff's Class Allegations on March 30, 2012.[# 16]. Both motions are fully briefed and pending before the District Judge.

This Court held a Scheduling Conference on April 24, 2012, and entered a case management schedule.<sup>1</sup> See [22, 23]. Defendants filed the Motion at issue on the following date. [# 24]. Defendants inform the Court that Plaintiff has served "voluminous" written discovery requests, which Defendants believe implicate "potentially dozens of terabytes of electronically stored information housed in several storage systems and include Defendants' highly confidential and proprietary trade secret software, data and information." *Id.* at 4. Defendants further explain that the instant lawsuit is "a carbon copy" of a lawsuit filed against the same defendants in the Middle District of Florida, in which the plaintiff's request for class certification was denied. *Id.* at 1–2. Defendants ask the Court to enter an order staying discovery pending the District Judge's resolution of Defendants' Motion to Dismiss and Motion to Strike. *Id.* at 1. Plaintiff opposes entry of a stay. See [# 28].

#### II. Analysis

Although the stay of proceedings in a case is generally disfavored, the Court has discretion to stay discovery while a dispositive motion is pending. *Wason Ranch Corp. v. Hecla Mining Co.*, No. 07-cv-00267-EWN-MEH, 2007 WL 1655362, at \*1 (D. Colo. June 6, 2007) (unreported decision) ("A stay of all discovery is generally disfavored in this District." (citation omitted)). See also *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 804 (Fed.Cir.1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved."); *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 02-CV-01934-LTB-PAC, 2006 WL 894955, at \*2 (D.Colo. Mar.

30, 2006) (finding that a thirty day stay of discovery was appropriate when a motion to dismiss for lack of personal jurisdiction was pending); *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C.2005) (“A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.” (internal quotation omitted)); *Nankivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D.Fla.2003) (A stay may be appropriate if “resolution of a preliminary motion may dispose of the entire action.”).

\*2 Questions of jurisdiction and immunity should be resolved at the earliest stages of litigation, so as to conserve the time and resources of the Court and the parties. *See, e.g., Siegert v. Gilley*, 500 U.S. 226, 231–32 (1991) (noting that immunity is a threshold issue and discovery should not be allowed while the issue is pending); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (same); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir.1992) (same); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 & 310 (1996) (noting that discovery can be particularly disruptive when a dispositive motion regarding immunity is pending); *cf. Gilbert v. Ferry*, 401 F.3d 411, 415–16 (6th Cir.2005) (finding stay permissible pending ruling on dispositive motion involving jurisdictional issue); *Enplaner, Inc. v. Marsh*, 11 F.3d 1284, 1291 (5th Cir.1994) (same).

When exercising its discretion in evaluating a request for a stay of discovery, the Court considers the following factors: (1) the interest of the plaintiff in proceeding expeditiously with discovery and the potential prejudice to the plaintiff of a delay; (2) the burden on the defendants of proceeding with discovery; (3) the convenience to the Court of staying discovery; (4) the interests of nonparties in either staying or proceeding with discovery; and (5) the public interest in either staying or proceeding with discovery. *String Cheese Incident*, 2006 WL 894955, at \*2 (citing *FDIC v. Renda*, No. 85–2216–O, 1987 WL 348635, at \*2 (D.Kan. Aug. 6, 1987) (unreported decision)). Here, the factors weigh in favor of staying discovery.

### 1) Plaintiff's Interest

Plaintiff contends that he would be significantly prejudiced by a delay of discovery, because of “stale or missing evidence, unavailable and destroyed documents,

increasingly unavailable or uninformed witnesses, and unmanageably short discovery deadlines.” [# 28] at 10. Further, Plaintiff explains that the video game in dispute was issued in 2006, and Defendants are in the process of producing new versions. *Id.* Thus, Plaintiff believes that it will be more difficult to discover information related to the earlier versions as time passes. *Id.*

Defendants counter, stating that a delay of discovery to resolve the issues in the two pending motions “will not materially impact the availability or quality of evidence in this case given the six year delay between the release of *Oblivion* and the filing of the Complaint.” [# 29] at 5. In any event, Defendants attest that they have instituted a litigation hold to preserve evidence. *Id.* Defendants emphasize that their burden outweighs any prejudice potentially suffered by Plaintiff. *Id.* at 6.

The Court is persuaded by Defendants' position. It is true that Plaintiff has a general interest in his case proceeding expeditiously, as do virtually all plaintiffs. However, Plaintiff allowed six years to pass between the issuance of the disputed video game and the filing of the instant action, thereby casting doubt on his assertion of significant prejudice from what would be a proportionately brief delay in discovery. Further, the Court recognizes Defendants' representation that a litigation hold has been implemented, as well as the law governing spoliation issues generally, which should alleviate Plaintiff's concerns regarding the diminishment of relevant discovery arising from production of new versions of the game. Thus, the Court finds that this factor weighs in favor of a stay of discovery.

### 2) Defendants' Burden

\*3 Plaintiff characterizes Defendants' assertion of burden as simply incidental to that incurred by participation in complex civil litigation. [# 28] at 11. Defendants claim that the burden of litigation is increased in this matter, because Plaintiff is seeking “premature class-wide discovery.” [# 29] at 4.

While Plaintiff is correct that the ordinary burdens associated with litigating a case do not constitute undue burden, *see Collins v. Ace Mortgage Funding, LLC*, 08–cv–1709–REB–KLM, 2008 WL 4457850, at \*1 (D.Colo. Oct. 1, 2008), complying with Plaintiff's discovery requests would impose on Defendants more than the ordinary burdens of litigation. Plaintiff seeks discovery regarding

his class action claims, which involve “[a]ll persons or entities residing in the State of Colorado who purchased any version of the *Elder Scrolls IV: Oblivion* video game.” [# 3] at 9. Discovery as to those claims is likely to be significant, as further evidenced by the extent of Plaintiff’s first set of written discovery requests. *See* [# 24–1] (interrogatories); [# 24–2] (requests for production).

Additionally, Defendants challenge the exercise of personal jurisdiction in this matter, which may be dispositive as to all asserted claims on jurisdictional grounds. *See* [# 5]. And, another District Court has rejected Plaintiff’s class action allegations in a similar case. *See Walewski v. ZeniMax Media, Inc.*, No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125 (M.D.Fla. Jan. 30, 2012) (recommending denial of motion for class certification, and recommending dismissal of case), *adopted by* 2012 WL 847236 (M.D.Fla. Mar. 13, 2012). For these reasons, the requested discovery may ultimately be useless and a waste of the parties’ time and resources. *See Stone v. Vail Resorts Dev. Co.*, No. 09-cv-02081-WYDKLM, 2010 WL 148278, at \*2 (D. Colo. Jan 7, 2010) (citing *Schmaltz v. Smithkline Beecham Corp.*, No. 08-cv-00119-WDM-MEH, 2008 WL 3845260, at \*1–2 (D.Colo. Aug. 15, 2008) (staying discovery only as to class claims upon finding that Defendant “demonstrated that significant discovery may be necessary for class claims that would otherwise be irrelevant”)). Thus, the second factor also favors entry of a stay.

### 3) Convenience to the Court

Plaintiff argues that the Court would be better served by denying Defendants’ request for a stay, because it “has already held a scheduling conference, issued a comprehensive scheduling order, and instructed the [p]arties to commence discovery immediately.” [# 28] at 15. Plaintiff believes that the two pending motions are unlikely to be dispositive of his claims, thus the Court will have to enter a new schedule, if discovery is now stayed. *Id.* Defendants, on the other hand, point to case law from this District stating that “it is certainly more convenient for the Court to stay discovery until it is clear that the case will proceed.” [# 29] at 6 (citation omitted).

The Court can be inconvenienced by an ill-advised stay, as the resulting delay makes the Court’s docket less predictable and, hence, less manageable. A stay may be particularly inconvenient for the Court when it is tied to a pending motion for which ultimate success is not

guaranteed. *Stone*, 2010 WL 148278 at \*3. Where a pending motion may dispose of an action, however, a stay of discovery may allow the Court to avoid expending resources in managing an action that ultimately will be dismissed. *See id.* Thus, despite this District’s general policy disfavoring a complete stay of proceedings, a stay may be appropriate if resolution of a preliminary motion may dispose of the entire action. *Id.* (quotation and citation omitted); *see also Namoko v. Milgard Mfg., Inc.*, No. 06-cv-02031-WDM-MEH, 2007 WL 1063564, at \*1 (D. Colo. April 6, 2007) (noting that stay appropriate where dispositive motion filed that might resolve entire case and “stay does not unduly prejudice the opposing party”).

\*4 Here, it is not clear whether the pending motions will dispose of the entire action. The Court takes no position as to the merits of the motions, except to note the existence of a decision from the Middle District of Florida denying a similar plaintiff’s motion for class certification as to the same video game and against the same defendants. Further, the Court notes that personal jurisdiction is necessary for the Court to entertain claims against a party, and the absence of personal jurisdiction results in the dismissal of the affected party without prejudice, as noted in Defendants’ Motion to Dismiss. It is clear that should the pending motions be granted, this Court will have expended resources managing a complex class action suit unnecessarily in the absence of a stay. *See Stone*, 2010 WL 148278 at \*3. Thus, the third factor concerning the Court’s interest in judicial economy weighs in favor of granting the stay.

### 4) Nonparties’ Interests

Plaintiff asserts that the putative class action members who are not yet parties to this lawsuit maintain an interest in “Plaintiff expeditiously pursuing his claims.” [# 28] at 16. Defendants counter, stating that potential class members’ “marginal” interests are identical to those of Plaintiff. [# 29] at 7. Therefore, as the interests of Plaintiff in pursuing the prosecution of his case are outweighed by the burden articulated by Defendants, likewise does the same burden outweigh any interest asserted by potential class action members. *See id.* The Court agrees, and finds that this factor favors staying discovery.

### 5) The Public’s Interest

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Plaintiff avers that the public interest favors prompt resolution of lawsuits, which in turn, favors denial of a stay. [# 28] at 16. On the other hand, Defendants contend that the conservation of resources by the Court and the parties is preferable. [# 29] at 8. As both statements are true, the Court finds that this factor weighs neither for nor against the entry of a stay in this matter.

Balancing the five factors here considered, the Court concludes that a stay of discovery is appropriate. The burden on Defendants of proceeding in discovery in this putative class action lawsuit while potentially fully dispositive motions are pending outweighs Plaintiff's interest in proceeding expeditiously with his case. Therefore, in the Court's discretion, *see Stone*, 2012 WL 148278 at \*4 (citation omitted), the Court grants Defendants' Motion and enters a stay of discovery.

### III. Conclusion

IT IS HEREBY **ORDERED** that Defendants' Motion to Stay Discovery and Incorporated Memorandum of Law and Request for Expedited Hearing [# 24] is **GRANTED**.

IT IS FURTHER **ORDERED** that discovery is **STAYED** pending the resolution of Defendants' Motion to Dismiss [# 5] and Motion to Strike [# 16].

IT IS FURTHER **ORDERED** that Defendants' responses to Plaintiff's written discovery requests shall be due, if at all, *thirty days* after the denial of Defendants' Motion to Dismiss [# 5] and Motion to Strike [# 16].

### All Citations

Not Reported in F.Supp.2d, 2012 WL 1801981

### Footnotes

- 1 Plaintiff contends that Defendants did not comply with D.C.COLO. LCivR 7.1A. before filing the instant Motion; however, Defendants indicated their intent to request a stay at the Scheduling Conference, and this intent is also reflected in the language stricken from the proposed Scheduling Order. *See Sched. Ord.*, [# 23] at 8–9. Thus, the Court finds the declaration attached to Plaintiff's Response disingenuous, as the declarant represents that defense counsel “did not inform Plaintiff's counsel that Defendants intended to move to stay discovery.” *See* [# 28–1] at 3.

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1987 WL 348635

Only the Westlaw citation is currently available.  
United States District Court, D. Kansas.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
in its corporate capacity, and Federal Deposit  
Insurance Corporation, in its capacity as  
Receiver of Indian Springs State Bank, Plaintiffs,

v.

Mario RENDA, et al., Defendants.

Civ. A. No. 85-2216-O.

|  
Aug. 6, 1987.

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

\*1 In this complex action, plaintiff Federal Deposit Insurance Corporation ("FDIC"), in its corporate capacity, and plaintiff Federal Deposit Insurance Corporation ("Receiver"), as receiver of Indian Springs State Bank ("ISSB"), allege that defendants have committed several violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). Plaintiffs also claim violations of various securities laws and raise several state law claims. Pending before the court are the following motions: (1) Defendants' motion for a stay of further proceedings and for a protective order as to pending discovery matters; (2) defendants' motion for review of the magistrate's order denying their motion for a protective order; (3) plaintiffs' joint motion for leave to file a second amended complaint and for an order permitting the Federal Savings and Loan Insurance Corporation ("FSLIC") to intervene as a plaintiff; (4) defendants' motion to dismiss the first amended complaint or for a more definite statement; and (5) a motion filed by certain of the defendants for leave to amend their answers. We shall make the following rulings.

I. *Background.*

Plaintiffs FDIC and the Receiver originally filed this action on April 5, 1985. On September 4, 1985, plaintiffs filed their first amended complaint. In their first amended complaint, plaintiffs name as defendants several individuals and entities, including, among others: Mario

Renda, Southbrook Homes, Inc., Nina Associates, Ltd., First United Realty Co., First United Fund, Ltd., First United Financial Corporation, and Joseph J. DeCarlo, Sr., ("the Renda defendants"); Sammy G. Daily and Sam Daily Realty, Inc., ("the Daily defendants"); Renate Winkler, as trustee for Barclay Trust; and V. Leslie Winkler.<sup>1</sup>

The essence of plaintiffs' multiple-count first amended complaint is that defendants devised an elaborate and complicated "linked financing" scheme to gain profit from the acquisition of fraudulent and illegal loans. Two of the targets of the scheme, plaintiffs allege in that complaint, were ISSB, a bank in Kansas City, Kansas, and Rexford State Bank ("Rexford"), a small rural bank in Kansas. Defendants effected the scheme, plaintiffs claim, through a pattern of regular and continuing criminal conduct, in violation of RICO. Plaintiffs also claim that defendants violated the federal securities laws. Finally, plaintiffs raise several state law claims, including common law fraud on the part of the defendants.

II. *Renda Defendants' Motion to Stay Further Proceedings.*

On June 29, 1987, the Renda defendants filed a motion to stay further proceedings and for a protective order as to pending discovery motions. They had twice earlier sought a stay and have filed other motions for protective orders. Indeed, as we noted above, defendants have asked the court to review the magistrate's denial of a protective order.

The Renda defendants' latest motion is prompted by the recent indictments handed down by a federal grand jury in Kansas on June 10, 1987, against Mario Renda and others involved in this civil action. An indictment is also pending in the Eastern District of New York. In their motion, the Renda defendants seek a blanket stay of all further proceedings in this action until after resolution of the criminal charges.

\*2 In considering defendants' motion, the court is mindful that "[t]here is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions." *Securities and Exchange Commission v. First Financial Group of Texas, Inc.*, 659

F.2d 660, 666–67 (5th Cir.1981). The Supreme Court has refused to create a per se rule prohibiting the simultaneous prosecution of civil and criminal actions because “prompt investigation and enforcement both civilly and criminally [are] sometimes necessary in order to protect the public interest....” *Id.* at 667 (citing *United States v. Kordel*, 397 U.S. 1, 11 (1970)).

It is well settled, however, that a trial court, in the exercise of its discretion, has the power to stay an action. As Justice Cardozo stated, in an oft-repeated phrase,

the 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. North American Co.*, 299 U.S. 248, 254–55 (1936).

Five factors have been universally recognized as being critical to a proper balancing of the competing interests at stake. Those factors are: (1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs 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. *In Re Mid-Atlantic Toyota Antitrust Litigation*, 92 F.R.D. 358, 359 (D.Md.1981); *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers*, 87 F.R.D. 53, 56 (E.D.Pa.1980). A fair and careful analysis of these five factors, we conclude, indicates that the blanket stay sought by the Renda defendants is neither necessary nor appropriate.

#### A. Plaintiffs' Interest.

The Renda defendants' motion, if granted, would halt all further proceedings for a minimum of five to six months and perhaps much longer. Obviously, then, their motion threatens to seriously impinge on plaintiffs' “right to pursue [their] case and to vindicate [their] claim expeditiously.” *Golden Quality*, 87 F.R.D. at 56.

Defendants argue that resolution of the criminal trial before continuation of this civil action would ultimately benefit plaintiffs by resolving many of the issues of civil liability. But, as plaintiffs note, most of the remaining discovery with respect to the Renda defendants concerns issues of causation and damages; those issues most certainly will not be resolved at the criminal trials.

Moreover, plaintiffs' interest in expediting its case weighs even more strongly than usual where, as here, plaintiffs are charged by Congress with acting quickly to protect the public interest. That charge, we believe, counsels caution in our contemplating the delay of this action.

#### B. Burden on Defendants.

\*3 Defendants cite several burdens they would face should the court deny their motion. Some of these “burdens” reflect legitimate concerns. Others, however, are exaggerated.

First, Mario Renda maintains that continuation of discovery in this case would divert his energies and resources from his defense of the criminal actions. Certainly, that would be true during the actual trial. But that fact does not indicate that a blanket stay of all further proceedings and discovery as to all *other* defendants is warranted. Rather, we conclude that a more reasonable, fair, and balanced approach is to stay discovery, at least as it affects Renda, during the actual trial. Indeed, even plaintiffs recognize that a stay of discovery during trial would be appropriate. Hence, Renda's concern can be alleviated through a far less draconian solution than a blanket stay.

Second, the Renda defendants charge that plaintiffs have and will share information gained through the liberal civil discovery process with the criminal prosecutors; information to which those prosecutors might not otherwise be entitled. *Corbin v. F.D.I.C.*, 74 F.R.D. 147, 149–50 (E.D.N.Y.1977). This burden, we believe, is entirely illusory. Defendants have no real evidence that plaintiffs have improperly shared information in the past. Certainly, there is no evidence that plaintiffs are using civil discovery as a pretext for gathering information for use in the criminal cases. *Cf. Campbell v. Eastland*, 307 F.2d 478 (5th Cir.1962), *cert. denied*, 371 U.S. 955 (1963). And if there were any reason to believe that plaintiffs might share information with the prosecutors, the solution would be

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a limited protective order proscribing such conduct, not a blanket stay.

Finally, Mario Renda argues that continuation of this action will infringe his fifth amendment right against self-incrimination. To support his argument, he cites several potential threats to his fifth amendment right. First, he notes that if the court either denies the pending motion to dismiss the first amended complaint or grants plaintiffs leave to file a second amended complaint, he will be required to file an answer. If he has to answer, he insists, he would be forced to choose between defense of this action and his right against self-incrimination. The fact of the matter is that he faces no such potential dilemma.

In a series of opinions—known as the *Garrity–Lefkowitz* line of cases—the Supreme Court has held that the use of a threat of serious economic harm to compel a person to waive his fifth amendment right and testify is unconstitutional. *Mid–America's Process Service v. Ellison*, 767 F.2d 684, 686 (10th Cir.1985) (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976)). Here, Renda faces a potential civil judgment of millions of dollars. Certainly he faces “serious economic harm.” But that potential harm will not be used to force him to waive his fifth amendment right. Rather, should he be required to answer the second amended complaint, he may answer the allegations by invoking the privilege. *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir.1983). His assertion of the privilege will be treated as equivalent to a specific denial. *Id.* at 929. *See also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1280 at 360–61. Consequently, because Renda may assert his fifth amendment privilege without penalty, his privilege would not and will not be infringed.

\*4 Second, Renda notes that, even though he may be able to invoke the privilege, the corporate defendants in this action have no such privilege. *See, e.g., Wilson v. United States*, 221 U.S. 361, 385 (1911). That fact, he argues, “creates a dilemma for [him] because a failure to answer by the corporate entities will expose them to a default judgment. [But] [i]f an answer is filed on their behalf, that answer may well be used against [him] in his capacity as president of those corporations.” Renda Defendants' Motion to Stay, at 16. Thus, he argues, the court should stay further proceedings to relieve him of the “dilemma.” In support of that position, he further notes that the Supreme Court, in *Kordel*, stated that if

no individual could answer for the corporation without a risk of self-incrimination, “[f]or present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action.” 397 U.S. at 9.

As Plaintiffs correctly observe, Renda does not suggest that, *in fact*, no other individual could answer interrogatories or other discovery matters on behalf of the corporate Renda defendants without risking self-incrimination. Indeed, an affidavit was prepared on behalf of First United Fund, Ltd., by Stuart Steinberg. No reason is given why he could not do so in the future. Hence, the *Kordel* dicta, even if accepted as the law, is apparently irrelevant to this action.

Moreover, the mere fact that the corporate defendants might provide information that would incriminate Mario Renda provides no reason to grant a stay. The fifth amendment only protects an individual from being forced to incriminate *himself*; it does not insulate him from damaging evidence provided by other individuals or entities. The United States District Court for the District of Utah aptly stated:

The privilege is a personal privilege that protects against the testimonial compulsion of an accused to testify against himself. [Citation omitted.] The priceless and time honored shield provided by the privilege cannot be used as an insurmountable barrier to block the introduction of other damaging evidence through the mouths of others, that provides, as here, the measure of defendant's responsibility. The invocation of the Fifth Amendment privilege does not and cannot stop the mouths of all witnesses as evidence against the person claiming the privilege. *The Fifth Amendment protects an individual, not from the introduction of incriminating evidence, but from compelling him to produce it.* [Citations omitted.]

*Hughes Tool Co. v. Meier*, 489 F.Supp. 354, 374–75 (D.Utah 1977) (emphasis added).

Finally, we also note that, to the extent Renda complains about the potential prejudice he might suffer from having to assert his fifth amendment privilege, a stay would not be likely to improve his situation. He has already asserted the privilege at his deposition and the law permits a jury in a civil action to draw an adverse inference from such an assertion. See *Fidelity Bankers Life Insurance Co. v. Wedco, Inc.*, 586 F.Supp. 1123, 1126 (D.Nev.1984). Hence, any damage that may arise from invoking the privilege in this civil action has already been done. (In any event, plaintiffs represent that, with the possible exception of his answer, “it is unlikely that Mr. Renda will be asked to speak again prior to trial.” Plaintiffs’ Memorandum in Support, at 11.)

#### C. Burden on the Court.

\*5 The Renda defendants argue that a stay will lessen the burden on the court because the outcome of the criminal trial may lessen the amount of court time in the civil action necessary to prove liability and because “continuation of civil discovery in the face of the pending indictment will require substantial supervisory judicial effort.” We do not agree.

It is not at all clear that the plaintiffs and the court will be relieved of the burden inherent in plaintiffs’ need to prove liability. Unlike the case cited by defendants—*Golden Quality*—the liability issues in the criminal and civil cases are far from identical. Moreover, even if the court denies the stay, the criminal case will undoubtedly be tried first. Hence, any potential lessening of the court’s burden because of the criminal verdict will occur regardless of our decision here.

Finally, we are not convinced that the court will save itself a significant amount of effort—if any at all—by granting a stay. It is far more likely that a stay would only postpone the court’s work, thereby frustrating the court’s strong interest in moving its docket.

#### D. The Interest of Non-Parties.

In an effort to suggest a potential detriment to non-parties, the Renda defendants note that both the civil complaint and the indictment allege that named and unnamed

individuals fraudulently obtained loans from ISSB. If subpoenaed to provide deposition testimony in the civil action, these non-parties would have to choose between asserting the privilege and incriminating themselves. Thus, defendants contend, a “[c]ontinuation of the civil action could jeopardize the Fifth Amendment rights of at least thirty individuals.” Renda Defendants’ Motion to Stay, at 18.

This suggested burden is of little weight. If non-parties are deposed and choose to invoke their privilege not to testify, their rights would be fully respected. Indeed, the court fails to perceive on what basis a party could assert that his constitutional right against self-incrimination had been impaired by the very exercise of that right.

Furthermore, the fact that a non-party, or a party for that matter, may not like some of the consequences of exercising his privilege is not a legitimate reason for depriving plaintiffs of their right to proceed with their case. As the court stated in *Controller of the Currency v. Lance*, 632 F.Supp. 437 (N.D.Ga.1986), “[t]he choice between testifying, or invoking the Fifth Amendment may be difficult, but it does not create a basis for a stay.” *Id.* at 442.

#### E. The Public Interest.

This factor, as do most of the others, weighs against the granting of the Renda defendants’ motion. Plaintiffs, pursuant to a congressional mandate, are seeking to recover damages allegedly caused by defendants as the result of a scheme that purportedly caused the failure of at least three financial institutions in Kansas. Obviously, the public has a keen interest in the swift resolution of the issues involved in this action, as well as in the payment of damages if liability should be established. Those public interests are especially critical where, as here, plaintiffs are a public agency specially charged with the responsibility of enforcing federal law. As the Supreme Court stated in *Kordel*:

\*6 It would stultify enforcement of a federal law to require a governmental agency ... invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending

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*the ultimate outcome of a criminal trial.*

397 U.S. at 11 (emphasis added).

#### F. Conclusion.

The above analysis demonstrates that a blanket stay, as sought by the Renda defendants, would be unnecessary, violative of plaintiffs' rights, and against the public interest. We recognize, however, that Mario Renda has a legitimate concern about the plaintiffs' pursuit of discovery from him during the actual criminal trial. Because his civil attorneys are also representing him in the criminal matters, his counsel will need to be free of distractions from this civil action during the criminal trial, if Renda is to receive adequate assistance of counsel. Therefore, we shall deny the Renda defendants' motion for a blanket stay. We shall, however, order a stay of discovery during the actual criminal trial itself. The Honorable Dale E. Saffels has scheduled the criminal trial to begin on October 19, 1987. *United States v. Renda*, No. 87-20049-01 (D.Kan., unpublished, July 23, 1987). We shall, thus, order that discovery be stayed as to those defendants named both in this action and in the criminal action pending before Judge Saffels from the date trial begins until the conclusion thereof. The court will, of course, consider modifying its order on a showing of good cause as the need may arise.

Concerning the Renda defendants' motion for review of the magistrate's order denying their request for a stay of discovery, we affirm the magistrate's order for all of the reasons stated above.

#### III. Plaintiffs' Motion for Leave to Amend and the FSLIC's Motion to Intervene

Plaintiffs have moved for leave to file a second amended complaint, which would add the following seven defendants: Antoinette Renda; Cindy Real Estate Partners, Inc.; MFS Partners, Inc.; Nevada Holdings Co., Inc.; Seaside Ventures, Ltd.; Waikiki Gateway Partners, Inc.; and Kansas City Associates, Inc. a/k/a Hawaiian Properties, Inc. (the "new Renda defendants"). Plaintiffs and the FSLIC have jointly moved for an order permitting the FSLIC to intervene and to file plaintiffs' second amended complaint. The second amended complaint would add new counts against the defendants based on their alleged participation in a scheme perpetrated

upon Coronado Federal Savings & Loan Association ("Coronado"). Plaintiffs and the FSLIC allege that the scheme involving Coronado was substantially identical to that perpetrated upon ISSB and, to a lesser extent, upon Rexford. The motion to amend and the joint motion to intervene are opposed by both the original and the new Renda defendants. The Daily defendants join in the Renda defendants' Memorandum in Opposition.

#### A. Motion to Amend

Motions to amend are governed by Federal Rule of Civil Procedure 15(a). Rule 15(a) clearly states that leave to amend "shall be freely given when justice so requires," and the Supreme Court has warned that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). A trial court has wide discretion in deciding whether to grant such a motion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971).

\*7 In the absence of a specific factor such as flagrant abuse, bad faith, futility of amendment, or truly inordinate and unexplained delay, prejudice to the opposing party is the key factor to be evaluated in deciding a motion to amend. *Dunn v. Kaaz Holding Co.*, No. 83-2375 (D.Kan., unpublished, July 2, 1985). Prejudice under Rule 15 "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakayne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir.1969). See also *LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1474 (10th Cir.1983) (no prejudice where the amended complaint referred to the "same chattels, the same consideration, and the same transaction which was the basis for the original complaint."). Such a change of theories would be prejudicial if, for example, the opposing party could show that it would be "disadvantaged or deprived of the opportunity to present facts or evidence which it would have [been able to] offer[ ] had the [movant's] amendments been timely." *Heyl & Patterson Inter'l v. F.D. Rich Housing*, 663 F.2d 419, 426 (3d Cir.1981). The party opposing the amendment of the pleadings has the burden of showing prejudice. *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir.1977).

Defendants first argue that plaintiffs have unduly delayed in seeking to name the seven new defendants. We disagree.

First, as to the six new corporate defendants, defendants offer no reason why plaintiffs should have been able to

name them sooner. Moreover, we agree with plaintiffs that the extremely complex nature of the purported scheme itself caused the delay. Plaintiffs state that they have had to “digest hundreds of thousands of pages of documents, and to unravel complicated real estate transactions conducted through shell corporations and straw entities ...” to learn the relationship of the six new corporate defendants to the purported scheme.

Second, as to Antoinette Renda, defendants' sole argument is that plaintiffs should have discovered a reference to her activities in an article that appeared in the *Kansas City Business Journal* on December 10, 1984, more than three years before the motion to amend was filed. In that article, it was stated that Mario Renda had testified in a deposition that “Southbrook [one of the original Renda defendants] helped First United Fund broker deposits into Indian Springs.” The deposition referred to in the article, defendants note, is attached to plaintiffs' proposed second amended complaint and identifies the connection between Mrs. Renda and Southbrook.

As plaintiffs correctly observe, however, Mrs. Renda is not even named in the article and the deposition itself was taken in a completely unrelated action, one in which the FDIC was not a party. Therefore, we find defendants' assertion that plaintiffs should have discovered Mrs. Renda's activities from the deposition and resulting article quite unpersuasive.

Defendants' second argument is that they would be prejudiced should the court grant plaintiffs leave to amend. Specifically, they note that over forty depositions have been taken and that, if the new Renda defendants choose to repeat the depositions, the original Renda defendants would have to attend them at a considerable cost.

\*8 In our view, defendants' assertion of prejudice is, however, grossly overstated. As plaintiffs point out, many of the depositions were attended only by local counsel and often no questions were asked by any defense counsel. Moreover, at many of the depositions, no answers were given because the deponents invoked their fifth amendment privileges. It seems unlikely that the new defendants would want to reschedule any of those depositions. Indeed, plaintiffs maintain that “very little if any of the discovery taken to date would need to be

retaken by the new Renda defendants, especially in light of the fact that the Renda defendants already intend to resume the depositions of a number of witnesses at a later date.” Plaintiffs' Reply Memorandum, at 36.

We also note that, although we granted the Renda defendants leave to file a Sur-Reply, they did not use that opportunity to challenge the plaintiffs' detailed analysis of why the depositions already taken would not have to be repeated. They did point to “three weeks of depositions” taken after plaintiffs filed the instant motion and, as to those depositions, again baldly assert that they will have to be retaken. Although plaintiffs have not been able to respond to that allegation, we believe it likely that defendants' position is as exaggerated on that point as it has been on many of their other claims of prejudice. The court concludes that defendants will not be *unduly* prejudiced—if prejudiced at all—by the addition of the new defendants or by the filing of the second amended complaint.

Finally, defendants argue that leave to amend should be denied because the amendments would be futile; that is, the second amended complaint would be subject to immediate dismissal. To support their claim of futility, defendants argue that the court would lack personal jurisdiction over Antoinette Renda and the six new corporate defendants, that some of the counts fail to state a claim, and that many of the counts would be barred by the applicable statutes of limitations.

It is true that the court need not allow the amendment of the pleadings if the amendment would clearly prove futile. *See Dickerson v. City Bank & Trust Co.*, 575 F.Supp. 872, 876 (D.Kan.1983). Here, however, defendants have attempted to raise a number of issues that cannot and should not be decided on a motion to amend.

For example, one of defendants' main arguments is that many of the counts would be barred by the statutes of limitation as to the new defendants. In their original response to the motion to amend, defendants argued that, in Kansas, the period of limitation as to the RICO counts is two years. Subsequent to the filing of their response, however, the Supreme Court held that four years is the appropriate period nationwide. *Agency Holding Corp. v. Malley-Duff & Associate*, 55 U.S.L.W. 4952 (June 22, 1987). Although defendants have since filed their Sur-Reply, it is not clear what their new position is with respect

to the effect of that decision. We are satisfied that there are still factual questions as to when the various causes of action arose. *See* Renda Defendants' Memorandum in Opposition, at 45–49. Hence, we simply cannot resolve the statutes of limitations issues at this juncture.

\*9 Similarly, defendants' suggestion that the court could not exercise personal jurisdiction over the seven new defendants cannot properly be decided now. Defendants' position is that service of process is not authorized under the Kansas long-arm statute and that the new defendants have not had sufficient contacts with this state to meet the requirements of due process. Plaintiffs respond, in part, by noting that nationwide service of process is authorized under the RICO statute, 18 U.S.C. § 1965(b), and that due process under that statute requires only that a nonresident defendant have minimum contact with the United States. *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir.1981); *Pioneer Properties, Inc. v. Martin*, 557 F.Supp. 1354, 1358 n. 6 (D.Kan.1983). *See also Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535 (9th Cir.1986). In their Sur–Reply, defendants argue that the RICO statute's nationwide service of process provision cannot be used to obtain personal jurisdiction over Antoinette Renda because the second amended complaint fails to state a claim under RICO as to her.

Obviously, then, at least with respect to the RICO counts, the court would first have to determine whether those counts sufficiently plead causes of action as to Mrs. Renda before it could determine whether personal jurisdiction could be exercised. And even if those counts did not state a claim, the court would have to examine the non-RICO counts to determine whether the court could exercise personal jurisdiction over her under the Kansas long-arm statute and the traditional due process analysis.

In short, defendants' arguments do not clearly indicate that the proposed amendments would be futile. (Indeed, even if correct, many of defendants' points would only relate to certain counts, not the entire complaint.) We agree with plaintiffs that defendants have, “in essence, [asked the court] to grant summary judgment in favor of defendants on each issue raised by defendants.” Plaintiffs' Reply Memorandum, at 39. That is, without observing the strict requirements wisely imposed on such motions (see, e.g., Local Rule 15(c)), defendants ask the court to resolve numerous complex legal and factual issues in their favor in the context of a motion to amend. We obviously are

not in a position to resolve those issues at this stage of the case. Defendants' suggestion that leave to amend should be denied on the ground of futility is thus not well taken and the court shall grant plaintiffs' motion for leave to file a second amended complaint.

Given the court's decision to allow plaintiffs to file a second amended complaint, defendants' motions to dismiss the first amended complaint and for leave to amend their answers are moot.

#### B. Motion to Intervene

The FSLIC, in a joint motion with plaintiffs, moves for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. That rule provides, in pertinent part:

\*10 (b) *Permissive Intervention.*  
Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The decision whether to allow a party to intervene is left to the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir.1978); *Brown v. Board of Education*, 84 F.R.D. 383, 405 n. 16 (D.Kan.1979).

We first find, despite defendants' assertion to the contrary, that the FSLIC's claim has numerous questions of law and fact in common with plaintiffs' action. Factually, the alleged scheme that FSLIC claims defendants perpetrated upon Coronado is for all practical purposes identical to that allegedly aimed at ISSB and Rexford; both schemes involved the same defendants, the same hired borrowers, and defendants allegedly used the same alter ego entities to hide transfers of funds. In fact, plaintiffs allege that defendants used proceeds of the scheme against Coronado to maintain its scheme against ISSB.

Similarly, both actions have nearly identical issues of law. Plaintiffs and the FSLIC allege that defendants conducted a scheme in violation of RICO. To prove their various RICO claims, they will have to prove that defendants conducted their affairs through a “pattern” of racketeering (18 U.S.C. §§ 1961(5) and 1962(c)), that defendants conducted the affairs of an “enterprise” through such a pattern (*id.* at §§ 1961(5) and 1962(c)), and that defendants invested income received from a pattern of racketeering in the operation of an enterprise.

In addition, we agree with the FSLIC and plaintiffs that “requiring FSLIC to proceed in a parallel action rather than allowing FSLIC to intervene in this action would result in two nearly identical trials.” Joint Memorandum in Support, at 5. Proof of defendants' racketeering activity directed at Coronado would be relevant and introduced in plaintiffs' action to show the requisite “continuity plus relationship” of defendants' pattern of racketeering activity” and vice versa. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3285 n. 14 (1985). Obviously, then, the interests of justice and the efficient use of the court's resources strongly weigh in favor of granting the motion to intervene.

Defendants, however, urge that the motion should be denied for three reasons: (1) that they will be unduly prejudiced; (2) that the FSLIC's motion is not timely; and (3) the FSLIC's complaint would be subject to immediate dismissal. Turning to their first reason, we are simply not convinced that defendants would be unduly prejudiced. Defendants' professed concern for jury confusion is unwarranted. Certainly, this is an extremely complex case. But we see very little, if any, danger of making this case any more complicated by the intervention of the FSLIC. As we indicated above, the jury will hear a great deal of evidence about the defendants' alleged activities at Coronado whether the FSLIC is added as a plaintiff or not.

\*11 Moreover, defendants' plea that intervention would cause too much additional discovery has little merit. As plaintiffs point out, “none of these defendants had conducted a single deposition in the discovery phase of this litigation until March 2, 1987, [and] [p]rior to that date counsel for defendants had been advised that FSLIC's entry into the case was imminent.” Joint Memorandum in Support, at 6. Further, defendants have long been on notice that their activity at Coronado was considered

relevant by plaintiffs to establishing a pattern of racketeering activity. In fact, defendants apparently have already scheduled depositions of Coronado witnesses, including its officers. Hence, the addition of the FSLIC will not significantly increase the need for discovery. We might also add that defendants would face at least as great a discovery burden should the FSLIC be denied permission to intervene and be forced to file a separate action.

Second, we find unpersuasive defendants' assertion that the FSLIC's motion is untimely. Defendants rely on an article that appeared in the *Kansas City Business Journal* on December 24, 1984, to argue that the FSLIC has had notice of its claims against defendants for more than three years. The article in question merely mentions that the FSLIC had entered a cease and desist order *directed against Coronado itself* because Coronado had “violated the loans-to-one-borrower regulation and engaged in unsafe or unsound practices by granting large loans without prior approval of the board of directors and accepting excessive deposits from a savings broker.” The article does not state that the FSLIC was aware that the named defendants were committing acts for which they are potentially liable under RICO.

Perhaps even more significantly, intervention by the FSLIC will not “unduly delay” this action. As we noted above, defendants have long known that plaintiffs considered defendants activity at Coronado to be relevant to this action. In addition, defendants' assertion that they are anxious to proceed to trial is belied by the fact that they themselves have sought to delay this action, as evidenced by their motion to stay further proceedings.

As to defendants' third reason to deny intervention—that the FSLIC's complaint would be subject to immediate dismissal—we adopt and incorporate the conclusions we reached in rejecting an identical argument made by defendants in opposition to plaintiffs' motion to amend. To resolve the arguments made by defendants, the court would have to decide disputed questions of fact and law. A motion to intervene is simply not the proper vehicle for the resolution of such issues.

In sum, we conclude that allowing the FSLIC to intervene will not unduly delay the case or prejudice defendants. Because the FSLIC's claims present so many common questions of law and fact, the court and the parties will be

spared the time and expense of conducting two complex, parallel actions. Therefore, we shall grant the motion.

**\*12** IT IS THEREFORE ORDERED that the Renda defendants' motion for a stay of further proceedings and for a protective order is denied, except that the court shall stay discovery as to those defendants who are named in both this civil action and in the criminal action pending before the Honorable Dale E. Saffels from the date the criminal trial actually begins until the conclusion thereof.

IT IS FURTHER ORDERED that defendants' motion for review of the magistrate's order denying defendants' motion for a protective order is denied.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to file a second amended complaint is granted.

IT IS FURTHER ORDERED that defendants' motion to dismiss the first amended complaint and defendants' motion to amend their answer are denied as moot.

IT IS FURTHER ORDERED that the joint motion of plaintiffs and the Federal Savings & Loan Insurance Corporation ?? an order permitting the FSLIC to intervene is granted.

**All Citations**

Not Reported in F.Supp., 1987 WL 348635

**Footnotes**

1 Other defendants, against whom default judgment has already been entered, included Franklin A. Winkler, F & I Real Estate Holding Co., First United Management Co., and First United Investment Co.

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Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

Randal ANKENEY, individually and on behalf of all others similarly situated, Fred Dale, individually and on behalf of all others similarly situated, Daman Thompson, individually and on behalf of all others similarly situated, Alejandro Perez, individually and on behalf of all others similarly situated, Plaintiffs,  
v.

STATE of Colorado, Rick Raemisch, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity, Roger Werholtz, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity, Tony Carochi, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity, Tom Clements, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity By and Through His Estate, Aristedes Zavaris, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity, Joe Ortiz, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity, and John Suthers, in His Official Capacity As Executive Director of the Colorado Department of Corrections, and in His Individual Capacity, Defendants.

Civil Action No. 14-cv-00007-MSK-KMT

Signed April 7, 2014.

#### Attorneys and Law Firms

Danielle C. Jefferis, David Arthur Lane, Killmer, Lane & Newman, LLP, Denver, CO, for Plaintiffs.

Nicole S. Gellar, Colorado Attorney General's Office, Denver, CO, for Defendants.

#### ORDER

KATHLEEN M. TAFOYA, United States Magistrate Judge

\*1 This matter is before the court on “Defendants' Unopposed Motion to Stay Discovery” (Doc. No. 24, filed March 28, 2014.)

In their Amended Complaint (Doc. No. 9, filed January 7, 2014), Plaintiffs allege claims pursuant to 42 U.S.C. § 1983, asserting that the Defendants' have failed to properly calculate their sentences with regard to award of good time and earned time credit. (*See id.*) On March 14, 2014, the defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). (*See* Doc. No. 24.) In their motion to dismiss, Defendants assert abstention under the abstention under the *Younger* doctrine and qualified immunity regarding Plaintiffs' claims for damages against them in their individual capacities. (*Id.*) The State of Colorado also asserts immunity to all claims against it pursuant to the Eleventh Amendment. (*Id.*) The defendants now move for a stay of discovery in this action pending ruling on their motion to dismiss.

Immunity provisions, whether qualified, absolute or pursuant to the Eleventh Amendment, are meant to free officials from the concerns of litigation, including avoidance of disruptive discovery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (citing *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)); *see also Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir.1992) (noting that qualified immunity, if successful, protects an official both from liability and the ordinary burdens of litigation, including far-ranging discovery) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). As explained by the Court in *Iqbal*, there are serious and legitimate reasons for this protection:

If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed

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decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to [the burdens of litigation discovery].

*Id.* at 685.

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. *See String Cheese Incident, LLC v. Stylus Shows, Inc.*, 02-CV-01934-LTB-PA, 2006 WL 894955, at \*2 (D.Colo. March 30, 2006). Fed.R.Civ.P. 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). 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.

\*2 *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (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.*

Additionally, "a court may decide that in a particular case it would be wise to stay discovery on the merits until [certain challenges] have been resolved." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2040, at 198 (3d ed.2010). Although a stay of all discovery is generally disfavored, *see Bustos v. U.S.*, 257 F.R.D. 617, 623 (D.Colo.2009), a stay may be appropriate if "resolution of a preliminary motion may dispose of the entire action." *Nankivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D.Fla.2003). *See also Vivid Techs., Inc. v. Am. Sci. & Eng'r, Inc.*, 200 F.3d 795, 804 (Fed.Cir.1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved"). When considering a stay of discovery, this court considers: (1) the plaintiff's interests 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. *See String Cheese Incident*, 2006 WL 894955, at \*2 (citing *FDIC v. Renda*, No. 85-2216-O, 1987 WL 348635, at \*2 (D.Kan.1987)).

Plaintiff does not oppose the Motion to Stay. Therefore, any prejudice to Plaintiffs' ability to proceed expeditiously with this case does not weigh heavily in the court's analysis. Moreover, the court finds that any potential prejudice to Plaintiffs is outweighed by the burden the defendants would face if forced to proceed with discovery in spite of well-established precedent supporting a stay when an immunity defense has been raised. Further, although qualified immunity is a potential defense only as to Plaintiffs' individual-capacity claims under § 1983, *see Rome v. Romero*, 225 F.R.D. 640, 643-644 (D.Colo.2004), the Supreme Court has recognized:

It is no answer to these concerns [of avoiding disruptive discovery] to say that discovery 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. As such, proceeding with discovery as to claims that are not subject to the assertion of qualified immunity is not a permissible alternative.

The third *String Cheese* factor also favors a stay. Although the court has an interest in managing its docket by seeing cases proceed expeditiously, any inconvenience that might result from rescheduling the docket is outweighed by the potential waste of judicial and party resources that would result from allowing discovery to proceed, only to have the case dismissed in its entirety on the grounds raised in the motions to dismiss. *See Nankivil*, 216 F.R.D. at 692 (a stay may be appropriate if “resolution of a preliminary motion may dispose of the entire action.”).

\*3 Finally, neither the interest of nonparties or the public interest in general prompt the court to reach a different result. Accordingly, on balance, the court finds that a stay of discovery is appropriate in this case. Therefore, it is

**ORDERED** that “Defendants’ Unopposed Motion to Stay Discovery” (Doc. No. 24) is **GRANTED**. All discovery in this matter is hereby **STAYED**. The Scheduling Conference set for April 24, 2014, is **VACATED**. The parties shall file a Joint Status Report within five days of a ruling on the motion to dismiss, if any portion of the case remains pending, to advise if the Scheduling Conference should be reset.

**All Citations**

Not Reported in Fed. Supp., 2014 WL 1363940

2010 WL 231555

2010 WL 231555

Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

Alison MAYNARD, and Gerald Lewis, Plaintiffs,

v.

The COLORADO SUPREME COURT OFFICE  
OF ATTORNEY REGULATION COUNSEL, April  
McMurrey, John Gleason, James Coyle, Colorado  
Supreme Court, Mary Mullarkey, Gregory J. Hobbs,  
Jr., Nancy Rice, Michael Bender, Nathan Ben  
Coats, Alex Martinez, and Allison Eid, Defendants.

Civil Action No. 09-cv-02052-WYD-KMT.

|  
Jan. 13, 2010.

#### Attorneys and Law Firms

Alison Maynard, Denver, CO, pro se.

Gerald Lewis, Kremmling, CO, pro se.

Maurice G. Knaizer, Colorado Attorney General's  
Office-State Services, Denver, CO, for Defendants.

### ORDER

KATHLEEN M. TAFOYA, United States Magistrate  
Judge.

\*1 This matter is before the court on “Defendants’  
Motion to Stay Discovery Pending Resolution of  
Defendants’ Motion to Dismiss” (Doc. No. 69, filed  
November 17, 2009) and Plaintiff Alison Maynard’s  
“Motion to Do Discovery, Including Renewed Motion  
for Rule 56(f) Extension; Partial Responses to Motion to  
Stay Discovery and Motion to Dismiss” (Doc. No. 83,  
filed December 8, 2009). Defendants filed their “Reply to  
Plaintiffs’ Motion to Do Discovery, Including Renewed  
Motion for Rule 56(f) Extension; Partial Responses to  
Motion to Stay Discovery and Motion to Dismiss” on  
December 22, 2009. (Doc. No. 86.) These motions are ripe  
for review.

Defendant requests a stay of discovery in this case because  
they have filed a motion to dismiss alleging this Court  
does not have subject matter jurisdiction under *District*

*of Columbia Court of Appeals v. Feldman*, 460 U.S. 462  
(1983) and *Rooker v. Fidelity Trust*, 263 U.S. 413 (1923)  
 (“*Rooker–Feldman* ”), *Younger v. Harris*, 401 U.S. 37  
(1971), *Middlesex County Ethics Committee v. Garden  
State Bar Ass'n*, 457 U.S. 423 (1982) and the Eleventh  
Amendment. (Doc. No. 69, ¶ 4.)

Plaintiffs argue that Defendants’ motion is a factual  
attack and that, as such, they are entitled to discovery  
to overcome allegations of defects in subject matter  
jurisdiction. (Doc. No. 83, ¶ 3.) “In addressing a factual  
attack, the court does not ‘presume the truthfulness of  
the complaint’s factual allegations.’ “ *U.S. v. Rodriguez–  
Aguirre*, 264 F.3d 1195, 1203 (10th Cir.2001) (quoting  
*Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir.1995)).  
However, the court does have “ ‘wide discretion to allow  
affidavits, other documents, and a limited evidentiary  
hearing to resolve disputed jurisdictional facts under Rule  
12(b)(1) .’ “ *Id.* Plaintiffs, in their response to the motion  
to dismiss, are not prevented from addressing any of the  
arguments made by Defendants using such means.

Plaintiffs also assert that they are entitled to discovery  
because neither *Younger* nor *Rooker–Feldman* bans claims  
for declaratory relief. (*Id.*, ¶ 5.) However, the *Younger*  
abstention dictates that federal courts not interfere with  
state court proceedings by granting equitable relief—  
such as injunctions of important state proceedings or  
declaratory judgments regarding constitutional issues in  
those proceedings—when such relief could adequately  
be sought before the state court.” *Amanatullah v.  
Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163  
(10th Cir.1999). Moreover, the *Rooker–Feldman* doctrine,  
which recognizes that the lower federal courts have  
no authority to review the final judgments of state  
courts, prevents a federal district court from issuing any  
declaratory relief that is inextricably intertwined with  
the state court judgment. *Kiowa Indian Tribe of Okla. v.  
Hoover*, 150 F.3d 1163, 1169 (10th Cir.1998).

Plaintiffs’ arguments regarding the preliminary injunction  
and the alleged conflict of the judge who heard the  
motion for preliminary injunction have been addressed  
and rejected multiple times in this case. This court declines  
to address the arguments again. (*See* Doc. Nos. 20, 61, 67,  
85.)

\*2 If the defendants prevail on their arguments, the  
entire case would be subject to dismissal pursuant to

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Fed.R.Civ.P. 12(b)(1) as to all claims and Fed.R.Civ.P. 12(b)(6) with respect to the first and second claims. (*See* Doc. No. 64.) The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases 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. *Kansas City Southern Ry. Co. v. United States*, 282 U.S. 760, 763 (1931).

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. *See String Cheese Incident, LLC v. Stylus Shows, Inc.*, 02-cv-01934-LTB-PAC, 2006 WL 894955, \*2 (D.Colo.2006) (unpublished). Fed.R.Civ.P. 26(c) does, however, provide

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 ...

*Id.* In this District, courts have found that forcing a party to engage in discovery when a motion to dismiss based on a jurisdictional defense is pending would subject him to undue burden or expense if the motion to dismiss is later granted. *String Cheese Incident* at \*2 (defense of lack of personal jurisdiction). This court, when considering a stay of discovery, may consider and weigh: “(1) plaintiff’s interests 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.” *Id.*; *see also, FDIC v. Renda*, No. 85-2216-O, 1987 WL 348635, \*2 (D.Kan.1987) (unpublished). Indeed, “a court may decide that in a particular case it would be wise to stay discovery on the merits until [certain challenges] have been resolved.” 8 Charles Alan Wright et al., *FEDERAL PRACTICE AND PROCEDURE* § 2040, at 521-22 (2d ed. 1994) (“[W]hen one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided.”); *see also Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 804 (Fed.Cir.1999) (“When a particular issue may be

dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.”).

In weighing the factors for determination of the propriety of a stay, the Court finds that a stay is appropriate here. It is in both parties’ interests to determine if this court has subject matter jurisdiction before engaging in expensive discovery. The parties stand to save expenses while this initial determination is considered by the district court. The Court also considers its own convenience, the interests of non-parties, and the public interest in general. None of these factors prompt the court to reach a different result. In fact, the court notes that neither its nor the parties’ time is well-served by being involved in possible discovery motions and other incidents of discovery when, as here, a dispositive motion involving a jurisdictional defense is pending. *Frontier Steel Bldgs. Corp. v. S.J. Amoroso Const. Co., Inc.*, 2008 WL 1925100, 2 (D.Colo.2008)(unpublished); *Democratic Rep. of Congo v. FG Hemisphere Assocs., LLC*, 2007 WL 4165397 at 2 (D.C.Cir. .2007) (unpublished)(noting that the reason jurisdictional defenses should be raised at the outset is to avoid unnecessary litigation); *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C.2001) (A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.) As the District of Columbia court stated, the imposition of a stay pending a decision on a dispositive motion that would fully resolve the case “furthers the ends of economy and efficiency, since if [the motion] is granted, there will be no need for discovery.” *Id.* at 5. Finally, neither party has asserted any compelling nonparty or public interests triggered by the facts at issue.

**\*3 It is therefore, ORDERED**

1. “Defendants’ Motion to Stay Discovery Pending Resolution of Defendants’ Motion to Dismiss” (Doc. No. 69, filed November 17, 2009) is GRANTED. Discovery is stayed pending ruling on Defendants’ Motion to Dismiss (Doc. No. 64); and
2. Plaintiff Alison Maynard’s “Motion to Do Discovery, Including Renewed Motion for Rule 56(f) Extension; Partial Responses to Motion to Stay Discovery and Motion to Dismiss” (Doc. No. 83) is DENIED;

3. The parties shall file a status report within ten days of ruling on the pending motion to dismiss to advise whether the Scheduling Conference should be reset.

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 231555

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As of: January 12, 2017 12:47 PM EST

[Nguyen v. Am. Family Mut. Ins. Co.](#)

United States District Court for the District of Colorado

August 13, 2015, Decided; August 13, 2015, Filed

Civil Action No. 15-cv-00639-WJM-KLM

**Reporter**

2015 U.S. Dist. LEXIS 106643 \*

MONG-TUYEN NGUYEN, an individual, and BRANDI WALLACE, an individual, Plaintiffs, v. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin mutual insurance company, and USAA GENERAL INDEMNITY COMPANY, a Texas corporation, Defendants.

**Subsequent History:** Dismissed by, in part, Summary judgment granted by, in part, Question certified by, Stay granted by [Nguyen v. Am. Family Mut. Ins. Co., 2015 U.S. Dist. LEXIS 137539 \(D. Colo., Oct. 8, 2015\)](#)

**Counsel:** [\*1] For Mong-Tuyen Nguyen, an individual, Brandi Wallace, an individual, Plaintiffs: Robert Bruce Carey, LEAD ATTORNEY, John Michael DeStefano, III, Hagens Berman Sobol Shapiro, LLP-Phoenix, Phoenix, AZ; Craig Richard Valentine, Hagens Berman Sobol Shapiro, LLP-Colorado Springs, Colorado Springs, CO.

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For USAA General Indemnity Company, a Texas corporation, Defendant: Jeremy A. Moseley, John Mark Vaught, Robert Eugene Burk, Wheeler Trigg O'Donnell, LLP, Denver, CO.

**Judges:** Kristen L. Mix, United States Magistrate Judge.

**Opinion by:** Kristen L. Mix

**Opinion**

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**ORDER**

**ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX**

This matter is before the Court on the parties' **Joint Motion to Stay Discovery Pending Resolution of Early Dispositive Motions** [#36]<sup>1</sup> (the "Motion").

Although [\*2] a stay of proceedings in a case is generally disfavored, the Court has discretion to enter a stay. *Compare Wason Ranch Corp. v. Hecla Mining Co., No. 07-cv-00267-EWN-MEH, 2007 U.S. Dist. LEXIS 41174, 2007 WL 1655362, at \*1 (D. Colo. June 6, 2007)* ("A stay of all discovery is generally disfavored in this District." (citation omitted)); *with Ellis v. J.R.'s Country Stores, Inc., No. 12-cv-01916-CMA-KLM, 2012 U.S. Dist. LEXIS 175257, 2012 WL 6153513, at \*1 (D. Colo. Dec. 11, 2012)* (granting stay of proceedings). The "[C]ourt has inherent power to stay proceedings 'to control the disposition of the causes on its docket with economy of time and effort for itself, for

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<sup>1</sup> "[#36]" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Order.

counsel, and for litigants." [Ellis, 2012 U.S. Dist. LEXIS 175257, 2012 WL 6153513, at \\*1](#) (quoting [Landis, 299 U.S. at 254](#) (observing that docket management "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance")); [Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc., 200 F.3d 795, 804 \(Fed. Cir.1999\)](#) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved."); [Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 2 \(D.D.C.2001\)](#) ("A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." (internal quotation marks and citation omitted)); *see also* [String Cheese Incident, LLC v. Stylus Shows, Inc., No. 05-cv-01934-LTB-PAC, 2006 U.S. Dist. LEXIS 97388, 2006 WL 894955, at \\*2 \(D. Colo. Mar. 30, 2006\)](#) (finding that a thirty day stay of discovery [\*3] was appropriate when a motion to dismiss for lack of personal jurisdiction was pending); [Nankivil v. Lockheed Martin Corp., 216 F.R.D. 689, 692 \(M.D. Fla. 2003\)](#) (finding that a stay may be appropriate if "resolution of a preliminary motion may dispose of the entire action."); 8 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2040, at 521-22 (2d ed. 1994) ("[W]hen one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided."); [Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc., 200 F.3d 795, 804 \(Fed. Cir. 1999\)](#) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved."); [Gilbert v. Ferry, 401 F.3d 411, 415-16 \(6th Cir. 2005\)](#) (finding that staying discovery is not an abuse of discretion when a defendant has filed a motion to dismiss challenging the court's subject matter jurisdiction); [Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 2 \(D.D.C. 2005\)](#) ("A stay of discovery pending the determination of a dispositive motion is an eminently logical means

to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." (internal quotation omitted)).

When exercising its discretion to enter a stay, the Court considers the following factors: (1) the interest of the plaintiff in proceeding expeditiously and the potential prejudice to the plaintiff of a [\*4] delay; (2) the burden on the defendant; (3) the convenience to the Court; (4) the interests of nonparties; and (5) the public interest. [String Cheese Incident, LLC, 2006 U.S. Dist. LEXIS 97388, 2006 WL 894955, at \\*2](#) (citing [FDIC v. Renda, No. 85-2216-O, 1987 U.S. Dist. LEXIS 8305, 1987 WL 348635, at \\*2 \(D. Kan. Aug. 6, 1987\)](#)).

In this case, a stay would apparently not prejudice Plaintiffs nor burden Defendants because they jointly request a stay. *Motion* [#36] at 1. Therefore, the Court finds that the first and second *String Cheese Incident* factors weigh in favor of a stay.

With regard to the third factor, if the case remains "in a stagnant state" on the Court's docket due to a stay, judicial economy is enhanced, as is convenience to the Court. In those circumstances, scheduling and discovery issues will not be raised and will not take time from the Court that could otherwise be used to address other matters. Thus, it is certainly more convenient for the Court to stay discovery until it is clear that the case will proceed. *See Chavous, 201 F.R.D. at 5* (staying discovery pending decision on a dispositive motion that would fully resolve the case "furthers the ends of economy and efficiency, since if [the motion] is granted, there will be no need for [further proceedings]"). The Court therefore finds that the third *String Cheese Incident* factor weighs in favor of [\*5] staying discovery.

With regard to the fourth factor, the parties assert that there are no nonparties with significant particularized interests in this matter at this stage of the case. *Motion* [#36] at 3. Accordingly, the fourth *String Cheese Incident* factor neither weighs in favor nor against staying discovery.

With regard to the fifth and final factor, the Court finds that the public's only interest in this case is a general interest in its efficient and just resolution. Avoiding wasteful efforts by the Court and litigants serves this interest. Thus, the fifth *String Cheese Incident* factor weighs in favor of a stay.

Considering these factors, the Court agrees with the parties that a stay is appropriate in this case. Accordingly,

IT IS HEREBY **ORDERED** that the Motion [#36] is **GRANTED**. This case is **STAYED** pending resolution of Defendant American Family's Motion to Dismiss [#14] and Defendant USAA General Indemnity Company's Early Motion for Partial Summary Judgment [#33].

IT IS FURTHER **ORDERED** that the Scheduling Conference set for August 19, 2015 at 10:30 a.m. is **VACATED**. The Court will reset the Scheduling Conference, if necessary, after resolution of the pending dispositive motions [##14, [\*6] 33].

Dated: August 13, 2015

BY THE COURT:

/s/ Kristen L. Mix

Kristen L. Mix

United States Magistrate Judge

2014 WL 1466721

2014 WL 1466721

Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

FEDERAL DEPOSIT INSURANCE CORPORATION  
as receiver for United Western Bank, Plaintiff(s),

v.

BANC OF AMERICA FUNDING CORPORATION;  
Bank of America Corporation; Banc of America  
Mortgage Securities, Inc.; Merrill Lynch, Pierce,  
Fenner & Smith Inc.; Morgan Stanley Capital  
I Inc.; Morgan Stanley & Co. LLC; Morgan  
Stanley; RBS Acceptance Inc.; RBS Securities,  
Inc; and RBS Holdings USA Inc., Defendant(s).

Civil Action No. 14-cv-00418-PAB-MJW

Signed April 15, 2014

**Attorneys and Law Firms**

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Denver, CO, Abigail Whitney Williams, Andrew Tyler  
Frankel, Thomas Charles Rice, Simpson Thacher &  
Bartlett, LLP, New York, NY, for Defendant(s).

**ORDER REGARDING(1) DEFENDANT  
MORGAN STANLEY'S MOTION TO  
ENFORCE THE PRIVATE SECURITIES  
LITIGATION REFORM ACT AUTOMATIC  
STAY AND FOR A PROTECTIVE ORDER  
STAYING DISCOVERY (DOCKET NO. 56)**

**AND**

**(2) DEFENDANTS' MOTION TO  
CONTINUE APRIL 16, 2014 SCHEDULING  
CONFERENCE (DOCKET NO. 58)**

Entered by Magistrate Judge Michael J. Watanabe

\*1 This matter was before the court for hearing on April 14, 2014, on Defendant Morgan Stanley's Motion to Enforce the Private Securities Litigation Reform Act Automatic Stay and for a Protective Order Staying Discovery (docket no. 56) and Defendants' Motion to Continue April 16, 2014 Scheduling Conference (docket no. 58). The court has reviewed the subject motions (docket nos. 56 and 58), an extra exhibit thereto (docket no. 57), joinders (docket no. 61, 62), the response (docket no. 70), and the reply (docket no. 71). In addition, the court has taken judicial notice of the court's file and has considered applicable Federal Rules of Civil Procedure and case law. The court now being fully informed makes the following findings of fact, conclusions of law, and order.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The court finds:

1. That I have jurisdiction over the subject matter and over the parties to this lawsuit;
2. That venue is proper in the state and District of Colorado;
3. That each party has been given a fair and adequate opportunity to be heard;
4. That Defendants argue that this court should enter a stay of discovery until Judge Brimmer rules on **either** the pending Motion to Remand to State Court (docket no. 45) filed by Plaintiff with this court on March 14, 2014, **or** on the motion to dismiss which will be filed by April 30, 2014, pursuant to the Private Securities Litigation Reform Act (PSLRA). Defendants further argue that under the PSLRA "in any private action arising under [the 1933 Act], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss...." 15 U.S.C. § 77z-1(b)(1). The only exception to this

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rule allows for “particularized discovery” needed to preserve evidence or prevent undue prejudice. 15 U.S.C. § 77z-1(b)(1). In addition, Defendants argue that a PSLRA discovery stay is “triggered by the mere indication by [the] defense of its intention to file a motion to dismiss.” *In re Carnegie Int'l Corp. Sec. Litig.*, 107 F.Supp.2d 676, 683 (D.Md.2000). Furthermore, Defendants argue that discovery on state law claims, such as those asserted in this case under the Colorado Securities Act (“CSA”), also are stayed by the PSLRA when they are included in the same complaint asserting federal securities claims. *See Union Cent. Life Ins. Co. v. Ally Fin., Inc.*, No. 11-cv-2890, 2012 WL 3553052, at \*2-4 (S.D.N.Y. Aug. 17, 2012).

In the alternative, Defendants argue that discovery should be stayed based upon *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 2006 WL 894955, at \*2 (D.Colo. Mar. 30, 2006) (citing *FDIC v. Renda*, 1987 WL 348635, at \*2 (D.Kan. Aug. 6, 1987)). Those factors under the *String Cheese* case are: (1) the plaintiff's interest in proceeding expeditiously with the civil action and the potential prejudice to the 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;

\*2 5. That Plaintiff FDIC as Receiver for United Western Bank (“Plaintiff”) argues that a stay of discovery should not be issued pursuant to the PSLRA and further that a stay of discovery should not be issued per the factors outlined in the *String Cheese* case. Plaintiff argues that it is a public entity prosecuting a public action as Receiver for United Western Bank and that this lawsuit is not a private action. Accordingly, Plaintiff argues that the automatic stay of discovery as argued by Defendants under the PSLRA is inapplicable. Furthermore, Plaintiff argues that the factors under the *String Cheese* case do not merit a stay of discovery in this case. Plaintiff urges this court, in its discretion, to deny a stay of discovery under the *String Cheese* factors. Lastly, Plaintiff argues that “[t]he decision to grant a protective order is vested in the district court's discretion.” *Wang v. Hsu*, 919 F.2d 130, 130 (10th Cir. 1990).

6. That with regard to the first factor under *String Cheese*, I find that the Plaintiff's interest in proceeding expeditiously with this action is inconsistent with Plaintiff's previous actions. Plaintiff has waited over three years before bringing this lawsuit as Receiver for United Western Bank. Waiting over three years to bring this lawsuit is not proceeding expeditiously;
7. That with regard to the second factor under *String Cheese*, I find that discovery in this lawsuit will be burdensome for the Defendants. There are ten certificates involved in this case, and, as stated by counsel during argument, a large volume of loan tapes and applicable underwriting guidelines will be requested in discovery. Further, it appears that many third party subpoenas will be needed to be served. Although the motion to dismiss has not yet been filed, based upon the proffer by Defendants, it is anticipated that such a motion will be filed by April 30, 2014. At this stage, whether such a motion to dismiss, once filed, is granted or denied is speculation. Judge Brimmer will ultimately decide such a motion to dismiss, and he will also decide the pending Motion to Remand to State Court (docket no. 45);
8. That with regard to the third factor under *String Cheese*, I find that the convenience to the court could be impacted depending upon which claims and parties remain in this court or whether the case is remanded back to state court;
9. That with regard to the fourth factor under *String Cheese*, I find that the interest of non-parties would favor a stay. Non-parties could be unnecessarily burdened by discovery requests via subpoenas and/or depositions if the soon-to-be-filed motion to dismiss is granted in whole or in part;
10. That with regard to the fifth factor under *String Cheese*, I find the public does have an interest moving this case to conclusion, but Plaintiff has failed to demonstrate how the public would suffer by stay of discovery until after Judge Brimmer rules on either the Motion to Remand to State Court (docket no. 45) or on the soon-to-be-filed motion to dismiss; and
11. That in weighing the relevant factors under *String Cheese*, I find that a stay of discovery pending resolution of either the Motion to Remand to State

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Court (docket no. 45) or on the soon-to-be-filed motion to dismiss should be granted. This court notes that the Motion to Remand (docket no. 45) was filed with this court on March 14, 2014, and the Response (docket nos. 53, 54, and 55) was filed on April 7, 2014. This motion will be ripe shortly for Judge Brimmer's consideration. Under the posture of this case, for the reasons stated above, and in light of the principles of judicial economy, the subject motions (docket nos. 56 and 58) should be granted.

**ORDER**

**WHEREFORE**, based upon these findings of fact and conclusions of law this court **ORDERS**:

1. That Defendant Morgan Stanley's Motion to Enforce the Private Securities Litigation Reform Act Automatic Stay and for a Protective Order Staying

Discovery (docket no. 56) is **GRANTED** for the reasons stated above;

- \*3 2. That Defendants' Motion to Continue April 16, 2014 Scheduling Conference (docket no. 58) is **GRANTED**. The Rule 16 Scheduling Conference set on April 16, 2014 at 9:30 a.m. is **VACATED**. The Scheduling Conference shall be re-set, if necessary, after Judge Brimmer rules on either the pending Motion to Remand to State Court (docket no. 45) or on the soon-to-be-filed motion to dismiss; and

3. That each party shall pay their own attorney fees and costs for this motion.

Done this 15th day of April 2014.

**All Citations**

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Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

Kendrick SAMUELS, Plaintiff,

v.

Patricia BALDWIN, Kerri Baroni, Richard Fisher, Bradley Johnson, Kerry Bynes, Thomas C. Fisher, M.D., Christine Sturgeon, N.P., Valerie Egley, R.N., Betty Kaspar, R.N., Amy Kammerzell, R.N., Meggan Eglinton, Jeffrey Hansen, and Nancy Davis, Defendants.

Civil Action No. 14-cv-02588-LTB-KLM

Signed January 16, 2015

**Attorneys and Law Firms**

Raymond K. Bryant, Civil Rights Litigation Group, PLLC, Denver, CO, for Plaintiff.

Jacob D. Masee, Colorado Attorney General's Office, Denver, CO, for Defendants.

**AMENDED<sup>1</sup> ORDER**

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

\*1 This matter is before the Court on Defendants' **Motion to Stay Discovery, Stay Rule 26 Deadlines and Proceedings, and to Vacate the January 20, 2015 Scheduling Conference** [# 16]<sup>2</sup> (the "Motion"). Plaintiff filed an Amended Response [# 38] in opposition to the Motion. Defendants ask the Court to stay discovery in this case until after the pending Motion to Dismiss [# 15] is resolved.<sup>3</sup> All Defendants in this action are identified in their personal capacities only, and each asserts a qualified immunity defense to Plaintiff's sole claim asserted under 42 U.S.C. § 1983 for the alleged violation of his rights under the Eighth Amendment. *See Compl.* [# 1]. Thus, if granted, the Motion to Dismiss would dispose of the sole claim asserted against each Defendant.

Questions of jurisdiction and immunity should be resolved at the earliest stages of litigation, so as to conserve the

time and resources of the Court and the parties. *See Behrens v. Pelletier*, 516 U.S. 299, 308 & 310 (1996) (noting that discovery can be particularly disruptive when a dispositive motion regarding immunity is pending); *Moore v. Busby*, 92 Fed.Appx. 699, 702 (10th Cir.2004) (affirming trial court's stay of discovery pending resolution of absolute immunity question); *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir.1995) ("the Supreme Court has repeatedly 'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' " (citation omitted)). Qualified immunity "give[s] government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery....' " *Behrens*, 516 U.S. at 308 (citation omitted). The Court is obligated to "exercise its discretion so that officials [properly asserting qualified immunity] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998). However, an assertion of qualified immunity "is not a bar to all discovery." *Rome v. Romero*, 225 F.R.D. 640, 643 (D.Colo.2004).

When exercising its discretion regarding whether to impose a stay, the Court considers the following factors: (1) the interest of the plaintiff in proceeding expeditiously with discovery and the potential prejudice to the plaintiff of a delay; (2) the burden on the defendants of proceeding with discovery; (3) the convenience to the Court of staying discovery; (4) the interests of nonparties in either staying or proceeding with discovery; and (5) the public interest in either staying or proceeding with discovery. *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 1:02-cv-01934-LTB-PAC, 2006 WL 894955, at \*2 (D.Colo. Mar. 30, 2006) (citing *FDIC v. Renda*, No. 85-2216-O, 1987 WL 348635, at \*2 (D.Kan. Aug. 6, 1987)).

\*2 Plaintiff provides a thoughtful, lengthy discussion regarding the fairness of the *String Cheese Incident* factors and why Plaintiff believes those factors automatically tend to weigh more heavily in favor of staying a case. *Response* [# 38] at 2-6. Although Plaintiff discusses several aspects of these factors, Plaintiff believes the greatest problem with *String Cheese Incident* is as follows:

A fundamental failing of the *String Cheese* analysis is that it does not include any "threshold" review of the applicable law related to the second prong of a qualified

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immunity analysis to determine if the type of violation at issue is one that “clearly established” law would recognize. A *String Cheese* analysis does not consider the strength of a motion to dismiss, at all.

*Id.* at 5. Plaintiff appears to suggest that a sixth factor should be added to the *String Cheese Incident* analysis when the stay is predicated on a pending dispositive motion. This factor would be akin to the first element examined in cases where preliminary injunctions are sought, i.e., examination of whether Plaintiff has a likelihood of success on the merits. *See, e.g., Assoc. of Christian Schs. Int'l v. Burwell*, — F.Supp.3d —, —, 2014 WL6704310, at \*5 (D.Colo. Nov. 26, 2014) (listing the elements a party must meet to obtain a preliminary injunction). But the Court is not inclined to create new law in this regard. In addition, as a practical matter, examining the merits of Plaintiff’s claims on a motion to stay discovery would essentially require adjudication of the dispositive motion at the same time, thus negating the entire purpose of the motion to stay. Moreover, that approach is simply not feasible in light of the Court’s workload.

Turning to the five traditional *String Cheese Incident* factors, the Court first addresses the interest of Plaintiff in proceeding expeditiously with discovery and the potential prejudice to Plaintiff of a delay. Plaintiff states:

Plaintiff has a significant interest in the just, speedy, and fair resolution of his case as prescribed by Fed.R.Civ.P. Rule 1. This case is now over two years old.<sup>4</sup> There is a continuing risk of evidence loss as the memories of the witnesses fade. There is an increased risk of evidence loss because the witnesses in this case are primarily detention officers who routinely deal with hundreds, perhaps thousands, of inmates in similar circumstances every year. Moreover, Plaintiff has an interest in the speedy resolution of his case because he suffers from ongoing medical complications resulting from the

incident that continue to cause hardship and expensive.

*Response* [# 38] at 6. Despite Plaintiff’s error about the age of the case, the Court gives Plaintiff the benefit of the doubt with respect to his interest in proceeding. Based on the considerations he expresses, the Court finds that the first *String Cheese Incident* factor weighs against staying discovery.

With regard to the second factor, the Court finds that Defendants have demonstrated that proceeding with the discovery process presents an undue burden. The defense of qualified immunity is available to 1) individual governmental officials, but not governmental entities; 2) regarding claims for monetary damages, but not claims for injunctive or declaratory relief; and 3) regarding claims against individual governmental officials in their individual capacities, not their official capacities. *Rome*, 225 F.R.D. at 643 (citations omitted). Here, the sole claim made in this case is subject to the qualified immunity defense, because Defendants are government officials, Plaintiff only seeks damages, and the sole claim asserted against each Defendant is in his or her individual capacity only. *Compl.* [# 1]. Based on these considerations and strong Supreme Court and Tenth Circuit precedent regarding assertions of qualified immunity and discovery, the Court finds that the second *String Cheese Incident* factor weighs heavily in favor of staying discovery.

\*3 With regard to the third factor, Plaintiff asserts that:

The interests of judicial economy are met by allowing the case to move forward and instituting reasonable deadlines to track its progress. The longer the case remains in a stagnant state, the longer the case will remain on the Court’s docket and the more difficult discovery and trial will likely be with witnesses who have trouble recalling the incident.

*Response* [# 38] at 7. This may be partially true. But if the case remains “in a stagnant state” on the Court’s docket due to a stay, judicial economy is enhanced, as is convenience to the Court. In those circumstances, scheduling and discovery issues will not be raised and will not take time from the Court that could otherwise be used to address the pending dispositive motion. Thus, it is

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certainly more convenient for the Court to stay discovery until it is clear that the case will proceed. *See Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 5 (D.D.C.2001) (staying discovery pending decision on a dispositive motion that would fully resolve the case “furthers the ends of economy and efficiency, since if [the motion] is granted, there will be no need for [further proceedings].”). Moreover, the effect that a stay will have on the difficulty of discovery and trial is speculative, at best. The Court therefore finds that the third *String Cheese Incident* factor weighs in favor of staying discovery.

With regard to the fourth factor, there are no nonparties with significant particularized interests in this case. Accordingly, the fourth *String Cheese Incident* factor neither weighs in favor nor against staying discovery.

With regard to the fifth and final factor, Plaintiff asserts:

Furthermore, there is a significant public interest in the speedy resolution of Section 1983 claims because the prosecution of such claims often shed[s] light on law enforcement misconduct that may, then, be recognized by the community and corrected by appropriate discipline or police procedure. The public interest is supported by a system in which civil rights claims may be allowed to proceed in a timely manner so that future plaintiffs are not deterred by the number of years it takes to seek justice.

*Response* [# 38] at 7 (citing *Chavez v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007 WL 683973, at \*2 (D.Colo.2007)). Defendant asserts that “the public's only

interest in this case is for its efficient and just resolution. It is in the public's best interest to avoid judicial waste and to avoid unnecessary waste and expense by the parties.” *Motion* [# 16] at 9.

The Court is not persuaded that stays in section 1983 cases are contrary to the public interest simply because they may delay appropriate discipline or procedural reform or deter future plaintiffs. The *possibility* that those effects may occur is outweighed by several factors, including the possibility that unnecessary expenditures of public and private resources on litigation will be minimized, the *probability* that judicial resources will ultimately be conserved by addressing dispositive issues early in the litigation, and the *probability* that both judicial and attorney resources will be conserved by clarifying and resolving disputed legal issues at the earliest possible time. Overall, the public's interest in the efficient and just handling of legal disputes favors imposition of a stay in these circumstances. Thus, the fifth *String Cheese Incident* factor weighs in favor of staying discovery.

\*4 Weighing the relevant factors, the Court concludes that staying discovery pending resolution of Defendants' Motion to Dismiss [# 15] is appropriate. Accordingly,

IT IS HEREBY ORDERED that the Motion to Stay [# 16] is GRANTED. All discovery is stayed pending resolution of Defendants' Motion to Dismiss [# 15].

IT IS FURTHER ORDERED that the Scheduling Conference set for January 20, 2015, at 10:30 a.m. is VACATED. It shall be reset, if necessary, after resolution of the Motion to Dismiss [# 15].

#### All Citations

Not Reported in Fed. Supp., 2015 WL 232121

#### Footnotes

- 1 This Amended Order amends and supercedes Order [# 36].
- 2 “[# 16]” is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Order.
- 3 The Motion to Dismiss [# 15], filed on December 1, 2014, is referred to the undersigned for recommendation [# 28].
- 4 The case was filed on September 18, 2014. *Compl.* [# 1]. Therefore, it is less than *four months* old.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02986-WYD-NYW

POLLY BACA and ROBERT NEMANICH,

Plaintiffs

v.

JOHN W. HICKENLOOPER JR., in his official capacity as Governor of Colorado,  
CYNTHIA H. COFFMAN, in her official capacity as Attorney General of Colorado and  
individually, and  
WAYNE W. WILLIAMS, in his official capacity as Colorado Secretary of State and  
individually,

Defendants, and

COLORADO REPUBLICAN COMMITTEE, DONALD J. TRUMP, and DONALD J. TRUMP  
FOR PRESIDENT, INC.,

Intervenors.

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**ORDER**

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Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendants' Motion to Stay Discovery and Disclosures and for Protective Order Under Fed. R. Civ. P. 26(c) ("Motion to Stay") filed by Defendants John W. Hickenlooper, Cynthia H. Coffman, and Wayne W. Williams (collectively, "Defendants"). [#31, filed January 12, 2017]. The Motion to Stay is before the undersigned Magistrate Judge pursuant to the Order Referring Case dated December 8, 2016 [#8] and the memorandum dated January 13, 2017 [#33]. After carefully reviewing the Motion and associated briefing, the entire case file, and the applicable case law, IT IS ORDERED that the Motion to Stay is GRANTED.

**Exhibit B**

## BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Polly Baca and Robert Nemanich initiated this action on December 6, 2016, by filing a Complaint in which they contend that Colorado’s binding presidential elector statute, Colo. Rev. Stat. § 1-4-304(5), is unconstitutional. [#1]. At the time Plaintiffs filed their Complaint, they were two of nine appointed presidential electors and were selected to vote for the candidates who received the majority of Colorado’s electorate vote. On November 8, 2016, Hillary Clinton and Timothy Kaine won the majority of Colorado’s votes, and thus Plaintiffs were tasked with the duty to vote for Ms. Clinton and Mr. Kaine when the Electoral College met on December 19, 2016. The Complaint asserts one claim for relief, and seeks declaratory relief that Colo. Rev. Stat. § 1-4-304(5) is unconstitutional under Article II of the U.S. Constitution, the Twelfth Amendment, the First Amendment, and the Fourteenth Amendment’s Equal Protection Clause, and permanent injunctive relief from Defendants “removing and/or replacing any presidential elector who votes for a presidential or vice presidential candidate who did not receive the highest number of votes in a general election in Colorado immediately preceding the convention of the electors.” [#1 at 7].

At the time they filed their Complaint, Plaintiffs also filed a Motion for Temporary Restraining Order and Preliminary Injunction, in which they asked the court to *inter alia* enjoin Defendants from removing or replacing them as electors, compelling them to vote for certain candidates, precluding them from voting for any candidates, “or otherwise interfering with the vote of the electors on December 19, 2016.” [#2 at 14]. On December 9, 2016, Defendants filed a Response arguing that section 1-4-304 is constitutional, and that Plaintiffs lack standing and are barred by the doctrine of laches with respect to their First and Fourteenth Amendment claims.

[#13]. The same day, the Colorado Republican Committee filed a Motion to Intervene, [#11], along with a Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction [ECF No. 11-1]. Then-President Elect Donald J. Trump and Donald J. Trump for President, Inc. also filed a Motion to Intervene. *See* [#16]. The court granted the motions. *See* [#15, #18].

On December 12, 2016, the presiding judge, the Honorable Wiley Y. Daniel, held a hearing at which he denied the Motion for Temporary Restraining Order and Preliminary Injunction on the record. *See* [#19]. Senior Judge Daniel thereafter issued a written order memorializing his ruling. *See* [#27]. On December 13, 2016, Plaintiffs appealed Senior Judge Daniel's ruling to the Tenth Circuit Court of Appeals and concurrently filed an emergency motion seeking an injunction pending appeal, which the Tenth Circuit denied in an order issued December 16, 2016. [#20, #26]. Plaintiffs subsequently voluntarily dismissed their appeal. *See* [#29].

On January 12, 2017, Defendants filed the pending Motion to Stay, in which the Intervenors joined. [#31, #32]. Defendants ask the court to stay discovery and the exchange of Federal Rule of Civil Procedure 26(a)(1) disclosures until it resolved what was then a forthcoming motion to dismiss. *See* [#31]. The following day, the Colorado Republican Committee, Donald J. Trump, and Donald J. Trump for President (collectively, "Intervenors") joined the pending Motion to Stay. [#32]. In light of the Motion to Stay, this court vacated the Scheduling Conference it had set for January 18, 2017, noting it would reset the Scheduling Conference at a later time if appropriate. *See* [#34]. On January 31, 2017, Defendants filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). *See* [#35].

On February 28, 2017, as the Parties were briefing the Motion to Stay and Motion to Dismiss, Plaintiffs filed a Motion to Amend their Complaint. The proposed Amended Complaint identifies four claims for relief: declaratory relief as to Plaintiffs’ constitutional rights with respect to Colo. Rev. Stat. §§ 1-4-304(5) and 1-13-723<sup>1</sup>; violation of Plaintiffs’ Twelfth Amendment rights and rights provided under 18 U.S.C. § 594 and Colo. Rev. Stat. § 1-13-713, pursuant to 42 U.S.C. § 1983, for “failing and refusing to disclaim any intent to criminally prosecute Plaintiffs...if they voted for anyone for President and Vice-President other than Clinton and Kaine”; for prospective injunctive relief from Defendants “intimidating, threatening, and/or coercing Plaintiffs or other presidential Electors,” in violation of these rights, pursuant to § 1983; and violation of their constitutional right to equal protection under § 1983 resulting from Defendants’ refusal “to disclaim any intent to criminally prosecute Plaintiffs,” for voting for someone for President or Vice-President other than the popular vote winner of the state. [#44-1 at 12-17]. Plaintiffs asserted in their Motion to Amend that “events leading up to and during” the Electoral College vote give rise to the new claims advanced under § 1983. [#44 at 2]. Some of the proposed allegations involve Elector Micheal Baca, a non-party, whom Defendant Williams referred to Defendant Coffman for criminal investigation after Mr. Baca cast his vote for President for John Kasich instead of Hillary Clinton. [#44-1 at ¶¶ 49, 65].

On March 21, 2017, Defendants filed a Response stating that, upon review of the proposed amended complaint, they would not oppose the Motion to Amend, but that they intend

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<sup>1</sup> Section 1-4-304(5) requires electors to vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in Colorado. Section 1-13-723 makes it a crime for any officer “upon whom any duty is imposed by any election law” to “neglect[] or omit[] to perform” the duty as imposed.

to file a renewed Motion to Dismiss, anticipating that the court will deny as moot their pending Motion to Dismiss as a motion directed at an inoperative pleading. *See* [#48 at 2]. The Intervenor joined Defendants' Response. *See* [#49]. On April 28, 2017, this court issued a Recommendation that the Motion to Amend be granted.<sup>2</sup> [#50]. Neither side filed an objection to the Recommendation.

At this time, the Recommendation remains pending, the Complaint is the operative pleading, and the Motion to Dismiss has not been mooted. During oral argument on the Motion to Stay, held May 23, 2017, counsel for Defendants confirmed that to the extent Senior Judge Daniel adopts the Recommendation on the Motion to Amend, they would renew their Motion to Dismiss, albeit to include additional argument regarding the new claims.

## ANALYSIS

### I. Applicable Law

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings, however the power to stay “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.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) (citing *Kansas City S. Ry. Co. v. United States*, 282 U.S. 760, 763 (1931)). Whether to stay discovery is a matter left to the sound discretion of the trial court. *Wang v. Hsu*, 919 F.2d 130, 130 (10th Cir. 1990). Although courts in this District generally disfavor the stay of all discovery, *see Wason Ranch Corporation*

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<sup>2</sup> This court notes that Senior Judge Daniel has previously observed that motions to amend are generally deemed nondispositive because they do not dispose of a claim or defense of a party. *See Patterson v. Powdermonarch, LLC*, No. 16-cv-00411-WYD-NYW, [ECF. No. 100] (D. Colo. May 22, 2017). As noted in the Recommendation in this action, this court construed the Motion to Amend as a dispositive motion given the language of Local Rule 72.3. D.C.COLO.LCivR 72.3; [#50 at 1 n.1].

*v. Hecla Mining Co.*, No. 07-cv-00267-EWN-MEH, 2007 WL 1655362, at \*1 (D. Colo. June 6, 2007), such a stay may be appropriate pending the resolution of a dispositive motion. *Ellis v. J.R.'s County Stores, Inc.*, 12-cv-01916-CMA-KLM, 2012 WL 6153513, at \*1 (D. Colo. Dec. 11, 2012). *See also* Fed. R. Civ. P. 26(c) (authorizing the court to issue, for good cause shown, “an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”).

In determining whether a stay is appropriate, the court weighs interests such as whether defendants are likely to prevail in the civil action, whether defendants will suffer irreparable harm, whether the stay will cause substantial harm to other parties to the proceeding, and the public interests at stake. *United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003). The court may also consider plaintiff’s interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay, the burden on the defendants, and the convenience to the court. *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 1:02-CV-01934-LTB-PA, 2006 WL 894955, at \*2 (D. Colo. Mar. 30, 2006) (citing *FDIC v. Renda*, No. 85-2216-O, 1987 WL 348635, at \*2 (D. Kan. Aug. 6, 1987)). “[W]hen one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided.” *Ellis*, 2012 WL 6153513, at \*1 (quoting 8 Charles Alan Wright, et al., *Federal Practice & Procedure* § 2040, at 521-22 (2d ed.1994)) (further citations omitted). *See also Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (“A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all

concerned, and to make the most efficient use of judicial resources.”) (internal quotation marks and citation omitted).

## II. Application

Defendants argue that the five factors identified by the court in *String Cheese Incident* counsel the court to grant their Motion to Stay. First, they contend, a stay causes no real prejudice to Plaintiffs because the members of the Electoral College have already met and cast their ballots, and Congress accepted the results on January 6, 2017, and thus the urgency underpinning the Motion for Temporary Restraining Order and Preliminary Injunction is no longer at issue. Furthermore, Plaintiffs do not need discovery to defend against the Motion to Dismiss, which implicates the court’s jurisdiction and the sufficiency of Plaintiffs’ pleading. *See* [#31 at 4]. Second, Defendants assert that the Secretary of State’s office has identified approximately 7,000 records as potentially relevant under Rule 26(a)(1), and that the process to review these materials for responsiveness and privilege will consume approximately 150 hours “of combined attorney and employee time,” which is particularly burdensome in the sense that discovery and disclosures will be rendered unnecessary if the court grants the Motion to Dismiss. [*Id.* at 5; *see also* #31-2]. Defendants opine that the court will likely grant the Motion to Dismiss considering that Senior Judge Daniel has already found that Plaintiffs could not demonstrate a substantial likelihood of success on the merits of their claims. [*Id.*] Third, Defendants argue that a stay relieves the court from adjudicating discovery disputes and otherwise intervening in discovery matters that may be rendered moot if the court grants the Motion to Dismiss. [*Id.*] Fourth, Defendants assert that a stay furthers the interests of Mr. Baca, a non-party, as he may elect to exercise his Fifth Amendment right to remain silent pending resolution of the criminal

investigation. [*Id.* at 6]. Finally, Defendants argue that the public “has an interest in the ‘efficient and just’ resolution of this case,” which interest is furthered by avoiding wasteful litigation practice. [*Id.* (citing *Nguyen v. Am. Family Mut. Ins. Co.*, No. 15-cv- 00639-WJM-KLM, 2015 U.S. Dist. LEXIS 106643, at \*4 (D. Colo. Aug. 13, 2015)].

Plaintiffs argue that the court should order the Parties to proceed with discovery altogether, but that if any stay is appropriate, it should not include Rule 26(a)(1) initial disclosures. *See* [#39 at 1]. Plaintiffs assert that they need access, through disclosures or discovery, to the following categories of documents so as to have “a full and fair opportunity to amend the Complaint as needed and obtain information necessary to respond to the motion to dismiss”:

1) Defendant Williams’ threats in the press, made after the Complaint was filed, to prosecute any elector who did not vote for Mrs. Clinton; 2) Defendant Williams’ removal of Mr. Baca as an elector; and 3) Defendant Williams’ referral of Mr. Baca for criminal investigation, will be important for potential § 1983 claims – the violation of Plaintiffs’ constitutional rights to vote as electors – as well as standing arguments to help demonstrate that the Plaintiffs’ claims are “capable of repetition but evading review.”

[*Id.* at 4 (citation omitted)]. Plaintiffs also assert that while the presidential election that gave rise to these issues has concluded, “many of these same issues and challenges to Colorado’s binding statute, C.R.S. § 1-4-304, will rise again and [they] may be electors again since they have both been electors on more than once occasion.” [*Id.*] They contend that a stay of discovery places them in jeopardy of “still lack[ing] clarity” by the time the Republican Party chooses electors in the summer of 2019, should the court grant a motion to dismiss and the Tenth Circuit reverse and remand the court’s decision. [*Id.* at 2]. Plaintiffs next argue that the information they seek poses no burden to Defendants. The documents they believe are

responsive are limited in time to November 2016 to the present, and the persons who have relevant knowledge are those “few people involved in the communications with Plaintiffs before the ballots were cast and the persons involved in the decision-making process and casting of ballots between mid-November 2016 and December 19, 2016.” [*Id.*] Plaintiffs argue Defendants offer no support for claiming that responsive documents amount to the several thousands, and suggest that the court limit Defendants’ search to using the words “elector,” “Baca,” and “Nemanich” from August 2016 to the present to lessen any burden on Defendants. [*Id.*]

On Reply, Defendants emphasize that a stay would amount to only a short period of time because briefing on the Motion to Dismiss is nearly complete. [#43 at 1]. They also argue that neither this District’s case law nor the Federal Rules of Civil Procedure contemplate the use of discovery to bolster a pleading, and Plaintiffs have provided no evidentiary basis to demonstrate that any burden they may incur as a result of a stay is greater than the burden Defendants would experience in expending the man hours to produce responsive documents in light of the possibility that their Motion to Dismiss may be granted.

Clearly, developments have transpired since Defendants filed their Motion to Stay that necessarily change the calculation of how long a stay could last. Defendants generally do not oppose the Motion to Amend and indeed contemplate filing a new motion to dismiss once and if the court accepts the proposed Amended Complaint. If Senior Judge Daniel accepts the new pleading, and Defendants file a new motion to dismiss, a stay of all discovery could potentially permeate into spring of 2018. On its face, the prospect of staying discovery past a year from when Plaintiffs initiated this action appears prejudicial. However, Plaintiffs do not argue that

they risk spoliation of evidence during a lengthy delay. While Plaintiffs' counsel stated in a January 2017 email to Defendants' counsel that "preservation of information is important," [#43-2], Plaintiffs argue in their Response to the Motion to Stay only that they need the identified materials to better craft their pleading and/or defend against the Motion to Dismiss. And Defendants assert, through the Declaration of Megan Waples, a Policy Analyst with the Colorado Department of State, that the Department has "taken steps to preserve the[] categories of information that Plaintiffs' counsel has requested." [#31-2 at ¶ 3]. Furthermore, Plaintiffs' attorney appears to have acknowledged, in the same January email, that "CORA [Colorado Open Records Act] requirements probably take care of most of [the preservation issue]...." [#43-2]. Plaintiffs' counsel also conceded at that time that he did not "anticipate a lot of discovery in this case as it is really a dec action on the constitutionality of statutes." [*Id.*] Accordingly, the preservation of specific evidence does not appear to be a concern. However, to the extent that document preservation remains an issue, this court will order that documents relevant to this action, including but not limited to documents that would be discoverable pursuant to Rule 26(a)(1), be maintained throughout the course of this action and any subsequent appeal(s).

In addition, Plaintiffs have now filed a proposed Amended Complaint and have done so without the benefit of any discovery. Although the proposed Amended Complaint adds new claims and allegations, it appears that the essence of the dispute remains the constitutionality of a state statute, now two state statutes. This court concurs with Plaintiffs' counsel's assessment in his email correspondence that the constitutionality of a statute is not a question that generally rises or falls on fact discovery. To the extent Plaintiffs contemplate additional amendments to their pleading following an exchange of disclosures or after they engage in discovery, or to avoid

a motion to dismiss by converting it to one for summary judgment as suggested during oral argument, Defendants are correct that courts do not allow parties to use the discovery process as a “fishing expedition” to develop claims. *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 531 (2009) (“Judges are trusted to prevent ‘fishing expeditions’ or an undirected rummaging through...records for evidence of some unknown wrongdoing”); *Barrett v. University of New Mexico Bd. of Regents*, 562 F. App’x 692, 695 (10th Cir. 2014). To the extent Plaintiffs feel they need the disclosures to respond to a motion to dismiss, I note that the currently pending Motion to Dismiss seeks dismissal for jurisdictional reasons in addition to pleading deficiencies. *See* [#35]. Defendants’ Rule 12(b)(1) argument is grounded in mootness and standing, and no new facts before the court indicate that Defendants would omit these jurisdictional arguments from a renewed motion to dismiss. Courts in this District have found that staying discovery pending the resolution of a jurisdictional challenge is a proper use of discretion and promotes efficiency. *See, e.g., Wyers Prods. Grp. v. Cequent Performance Prods., Inc.*, Case No. 12-CV-02640-REB-KMT, 2013 WL 2466917, at \*2 (D. Colo. June 7, 2013); *Steinmier v. Donley*, Case No. 09-CV-01260-KMT-BNB, 2010 WL 1576714, at \*1 (D. Colo. Apr. 20, 2010). In addition, when considering motions to dismiss in which the sufficiency of the pleadings is challenged, the court takes all well-pled factual allegations in a pleading as true, and draws all reasonable inferences in favor of the non-moving party. *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013).

On balance, I find that a stay of all discovery, including disclosures, is proper. In so finding, I have considered the nature of Plaintiffs’ claims, the type of discovery sought, and the reasons they say they need the discovery. I have also considered the nature of Defendants’ arguments as raised in the Motion to Dismiss, and the prejudice Plaintiffs assert they will incur,

which appears to be relatively small and speculative, compared to the burden placed on Defendants of generating production that may ultimately be unnecessary.<sup>3</sup>

For the foregoing reasons, **IT IS ORDERED** that:

1. The Motion to Stay Discovery and Disclosures and for Protective Order Under Fed. R. Civ. P. 26(c) [#31] is **GRANTED**;
2. Defendants and Intervenors are **ORDERED to PRESERVE** all documents that could be relevant to this action under Rule 26(b)(1), including but not limited to any documents that would be identified and disclosed pursuant to Rule 26(a)(1) Initial Disclosures; and
3. The Parties shall file a joint status report with the court within five days following a disposition of either the original motion to dismiss or renewed motion to dismiss, depending on whether the original motion to dismiss is mooted and then replaced, should the ruling not dispose of the case in its entirety.

DATED: May 24, 2017

BY THE COURT:

s/Nina Y. Wang  
United States Magistrate Judge

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<sup>3</sup> Nothing in this Order should be construed as this court passing on the merits of Plaintiffs' operative claim or proposed claims.