

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

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459-GLR

Hon. George L. Russell, III

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO LIFT THE STAY OF
COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM
OPINION AND ORDER**

Nearly three months have passed since this Court affirmed Magistrate Judge Copperthite's Order, which compelled Defendants to produce three discrete categories of documents that the Court determined were not subject to the deliberative process privilege. In affirming Magistrate Judge Copperthite's Order, this Court specifically found that the factors "weigh[ing] strongly in favor of disclosure" outweighed "the risk that disclosure will chill future policymaking discussions." ECF 227 at 16. The Court noted that Defendants relied on a generalized assertion that disclosure would chill candid discussion, but made no attempt to "explain . . . why the chilling effect is particularly great in this case or why it is great enough to outweigh" the factors favoring disclosure. *Id.* at 16, n.10.

Nevertheless, at Defendants' request, this Court temporarily stayed enforcement of the order pending a decision by the Ninth Circuit in a related case, noting that "the stay should be brief." *Id.* at 21. In their request, Defendants repeatedly assured the Court that Plaintiffs would suffer no harm from a temporary stay because they remained protected by the preliminary injunction. *See* ECF 208 at 10 ("because there is a preliminary injunction in place, Plaintiffs

cannot point to any alleged ongoing harm”); ECF 215 at 6 (“Plaintiffs will suffer *no* harm because a preliminary injunction is in place”).

The circumstances have now changed. Three months have passed without a ruling from the Ninth Circuit, and Defendants have sought to eliminate the preliminary injunction that was supposed to protect Plaintiffs while the Stay remained in effect. *See* ECF 234 (requesting the preliminary injunction be stayed). Absent the protection of an injunction while this case is litigated, Plaintiffs are entitled to the opportunity to fully and expeditiously press their claims, which requires access to the thousands of documents that Defendants have improperly withheld. In view of these changed circumstances, Defendants’ asserted interest in “judicial economy” cannot justify maintaining the Stay.

I. THE BALANCE OF THE RELEVANT FACTORS NOW FAVORS LIFTING THE STAY.

Circumstances have materially changed since November 30, 2018. In view of the length of the Stay, the severe risk of harm it poses to Plaintiffs, and the much more limited harm posed to Defendants in lifting the Stay, any interest in promoting judicial economy is outweighed, and the Stay should be lifted. Lifting the Stay to allow prompt disclosure of documents subject to the USMJ Order also serves the public interest.

A. Plaintiffs Face Significant Harm from the Continued Stay.

Defendants deny that the Stay imposes any burden on Plaintiffs, claiming that there is “no meaningful harm” in Defendants’ continued withholding of documents the Court has determined not to be protected by the deliberative process privilege. ECF 243 at 8. Defendants make two arguments in support of this assertion. *Id.* at 8–9. Neither has merit.

First, Defendants argue that further delays in discovery will not prejudice Plaintiffs because Plaintiffs have already moved for summary judgment. *Id.* at 8. This argument has been,

and remains, a red herring. Defendants have themselves moved for summary judgment, and Plaintiffs opposed that motion in part because Defendants continue to withhold material facts from Plaintiffs—including the materials encompassed by the USMJ order. *See* ECF 163-2 at 3; ECF 163-16 at 8–14; *see also Zook v. Brown*, 748 F.2d 1161, 1166 (7th Cir. 1984) (“The contention of one party that there are no issues of material fact sufficient to prevent the entry of judgment in its favor does not bar that party from asserting that there are issues of material fact sufficient to prevent the entry of judgment as a matter of law against it.” (internal quotation marks omitted)); *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) (“[T]he Court ordinarily should not stay discovery which is necessary to gather facts in order to defend against the motion.” (citation omitted)). Plaintiffs are entitled to disclosure of discoverable materials that will assist them in rebutting Defendants’ motion.

Second, regardless of how the Court evaluated the harm to Plaintiffs on November 30, 2018, its evaluation must be different today. When the Stay was issued, Plaintiffs in this case and related cases were protected by nationwide preliminary injunctions.¹ Now, Defendants have moved to stay the injunction here in its entirety. *See* ECF 242. Unlike in November 2018, certain Plaintiffs face severe and immediate harm from potential denial of the opportunity to enlist or apply for commissions (*see* ECF 235 at 4–5), in addition to the irreparable harm all

¹ Defendants appear to contend that the Court, in granting Defendants’ Motion to Stay Compliance with the USMJ Order, disregarded the arguments Defendants made supporting that Motion. ECF 243 at 9. But the briefing makes clear that a critical component of Defendants’ argument for a Stay was that any harm to Plaintiffs would be greatly mitigated by the continuation of the preliminary injunction. *See* ECF 208 at 10 (“because there is a preliminary injunction in place, Plaintiffs cannot point to any alleged ongoing harm”); ECF 215 at 2–6 (“Plaintiffs will suffer *no* harm because a preliminary injunction is in place”).

Plaintiffs suffer so long as the discriminatory Implementation Plan remains in effect (*see* ECF 139 at 31–32; ECF 163-2 at 21–22).²

B. In Contrast to Plaintiffs’ Irreparable Harm, Any Potential Harm to Defendants Is Minor and Curable.

Defendants contend that they will be irreparably harmed if discovery is permitted to proceed, because compliance with the USMJ Order “will result in the irretrievable disclosure of thousands of privileged documents covering multiple military policies,” a disclosure Defendants claim “cannot be undone.” ECF 243 at 7. But this Court already weighed Plaintiffs’ need for the privileged documents against the alleged harms of disclosure and concluded that the factors “weigh[ing] strongly in favor of disclosure” outweighed “the risk that disclosure will chill future policymaking discussions.” ECF 227 at 16. Defendants now repeat the same argument in support of continuing the stay, but they still fail to “explain . . . why the chilling effect is particularly great in this case or why it is great enough to outweigh” the factors in favor of disclosure. *Id.* at 16, n.10.

In any event, production of compelled information pending appeal is a “common occurrence.” 13B Charles Alan Wright et al., *Fed. Prac. & Proc. Juris.* § 3533.2.2; *see, e.g., United States v. Sweet*, 1980 WL 4702, at *1 (5th Cir. 1980) (per curiam) (stating that alleged injury from disclosure pending appeal was not irreparable because “nothing contained herein, of course, constitutes a ruling concerning the admissibility or inadmissibility in evidence of any documents”); *United States v. Bright*, 2008 WL 351215, at *3 (D. Haw. 2008) (“The mere requirement to produce documents while an appeal is pending does not constitute sufficient harm

² Defendants’ assertion that the District Court *could* hypothetically have granted Defendants’ motion to dissolve the preliminary injunction prior to issuing the Stay on November 30, 2018, thus placing the possibility of a stay in the absence of a preliminary injunction before the Court (ECF 243 at 9), is entirely theoretical and thus beside the point.

to warrant a stay.”); *Memphis Publishing Co. v. F.B.I.*, 195 F. Supp. 3d 1, 4 (D.D.C. 2012) (ordering production of compelled documents while government defendants considered appellate options). If an appellate court later determines that certain documents subject to the USMJ Order are, in fact, protected by the deliberative process privilege, Defendants may claw back the privileged documents, and the Court may “provide effective relief by preventing further disclosure and by excluding the evidence from trial.” See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 n.2 (2011); see also *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) (“Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.”). In the meantime, Defendants may designate produced materials as confidential under the Protective Order to prevent further dissemination. See ECF 111.

The cases on which Defendants rely (ECF 243 at 7–8) are distinguishable. Most concern circumstances where a stay was necessary to prevent *publication*—as opposed to just production—of sensitive material. For example, in *HHS v. Alley*, 556 U.S. 1149 (2009), the Supreme Court granted a stay of disclosure of FOIA information while the Eleventh Circuit considered the applicability of a decades-old injunction preventing certain agencies from disclosing lists of Medicare disbursements, which had the potential to identify members of a certified class of individual medical providers. Similarly, in *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979), the FBI and an individual successfully sought a stay of disclosure to a newspaper of the results of an illegal wiretap. *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008), concerned a request by a media group to unseal portions of a criminal plea agreement which, if published, had the potential to put cooperating members of a drug cartel in danger. *Id.*

at 1025. Finally, *U.S. v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006), the sole case not involving publication, did not involve documents at all. Rather, it was a criminal case in which defense counsel sought an order permitting deposition of government witnesses with the potential to disclose trade secrets. Because the order would influence results at an imminent trial in ways that could not be corrected on appeal, the Ninth Circuit concluded a stay was warranted. *Id.* These cases are far removed from the circumstances presented here.

C. The Protracted Length of the Stay Supports Lifting It.

The Stay has now been in effect for three months. Nearly five months have passed since the Ninth Circuit heard argument in the *Karnoski* case. Defendants acknowledge that no party knows when the Ninth Circuit will issue a decision—a factor weighing against continuation of the Stay. *See Cheyney State Coll. Fac. v. Hufstedler*, 703 F.2d 732, 738 (3d Cir. 1983) (emphasizing that stays are appropriate when of “moderate length” but “not those of indefinite duration”). Defendants note that, in certain other cases, stays have lasted longer. ECF 243 at 9–10. But this is not a typical case; Plaintiffs plead serious constitutional violations, and—as discussed *supra*—will suffer immediate irreparable harm if the preliminary injunction is lifted.

D. The Promotion of Judicial Economy Is Insufficient to Outweigh the Other Factors.

Defendants contend that judicial economy is promoted by maintaining the Stay until the Ninth Circuit rules on the mandamus petition in *Karnoski*. ECF 243 at 6–7. However, as Plaintiffs have explained (ECF 211 at 7–8), the discovery dispute in *Karnoski* is significantly broader than in this case. Contrary to Defendants’ suggestion, this Court did not rule that duplication would necessarily result from proceeding with discovery before the Ninth Circuit’s ruling. *See* ECF 227 at 21 (stating only that “staying the [USMJ] order . . . until the resolution of the appeal in *Karnoski* could avoid duplicative litigation” (emphasis added)). The substantial

differences between the orders at issue underscore the need to permit the Plaintiffs in *this* case to obtain the discovery to which they are entitled, and not force Plaintiffs to “stand aside while a litigant in another [case] settles the rule of law that will define the rights of both.” *See Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Even if awaiting a decision from the Ninth Circuit in *Karnoski* would promote some measure of judicial economy, in view of how the balance of the other factors now tilts firmly against a stay, Defendants cannot make out a “clear case of hardship or inequity in being required to go forward” with discovery in this case. *See id.*

E. Lifting the Stay to Permit Disclosure of Subject Documents Is in the Public Interest.

Contrary to Defendants’ assertion, maintaining the Stay is not in the public interest. This Court has already determined that the deliberative process privilege does not justify withholding documents that are subject to the USMJ Order. *See United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (“The public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders.”). And because these documents are relevant to claims of unlawful intent underlying an unconstitutional policy, the public has a particularly strong interest in their disclosure to Plaintiffs. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) (“The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”).

Defendants’ argument that disclosure of the subject documents could have a “chilling” effect on future policy discussions and DoD’s ability to solicit input from various sources (ECF 243 at 13) merely reprises Defendants’ opposition to Plaintiffs’ Motion to Compel. The Court already considered this argument and concluded that any risk of chilling future policy

discussions posed by disclosure was outweighed by the critical nature of the evidence sought by Plaintiffs, the lack of alternative evidence of governmental intent, and the central role the government plays in this litigation. ECF 227 at 16. If these documents are subject to disclosure (as the Court has held), there is no public interest in delaying that disclosure further.

II. DEFENDANTS' ARGUMENT THAT DISCOVERY SHOULD NOT CONTINUE WHILE DISPOSITIVE MOTIONS ARE PENDING HAS ALREADY BEEN REJECTED BY THIS COURT.

Finally, Defendants contend that discovery should not continue—at all—until after the Court has ruled on various pending motions. ECF 243 at 11–12. In addition to being baseless,³ this argument is irrelevant to the instant Motion. More important, the Court has already rejected this argument, repeatedly. ECF 204 at 4 (“there are no justifiable reasons to stay decisions on the discovery disputes pending the outcome of the dispositive motions or for any other proffered reasons”); ECF 227 at 13 (“The USMJ acted well within the bounds of his broad discretion when deciding to grant the Motion to Compel, particularly given the interest of this Court in moving the case toward a conclusion where ‘the parties appear to be very litigious.’”); *see also* ECF 170 (denying Defendants’ earlier request to stay discovery and holding that “[t]he Court does not consider the fact that motions are currently pending to be sufficient justification to warrant a stay of discovery. Nor is the Court persuaded that a stay will serve the interests of judicial economy.”). In short, the Court already determined that discovery should proceed while dispositive motions are pending, and nothing has changed that should disturb that conclusion.

Defendants cite a recent order in the related case *Doe v. Shanahan* (ECF 243 at 12), but that order is distinguishable, and does not support their desired conclusion. In *Doe*, the district court denied several pending discovery motions in light of a judgment on an appeal in that same

³ The *deadline* for completing discovery was suspended; not discovery itself. ECF 213.

case and a Supreme Court ruling, both of which issued several months after the discovery motions under consideration had been filed. In view of the changed posture of that case, the *Doe* court denied the motions and ordered the parties to meet and confer on the appropriate scope and breadth of discovery in view of the intervening rulings. But Defendants have not filed any appeal in this case. And in any event, the *Doe* court merely directed the parties to meet and confer. It did *not* halt discovery entirely, as Defendants suggest the Court do here.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiffs' opening Motion (ECF 239), Plaintiffs respectfully request that the Stay entered on November 30, 2018 be lifted, and Defendants be ordered to begin complying with the USMJ Order within 10 days.

Dated: February 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2019, a copy of the foregoing and all accompanying documents were served via CM/ECF on all counsel of record.

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