Elgamal v. Johnson et al Doc. 78

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ashraf Elgamal, individually and as guardian ad litem for A.E, a minor; Amanda Elgamal, an adult, Plaintiffs, vs. Jeh Johnson, Secretary of the Department of Homeland Security; Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services; John Ramirez, Field Office Director; Rebecca Bernacke, in her individual capacity; Cynthia Harper, in her individual capacity, Defendants.	No. CV-13-867-PHX-GMS (LOA) (lead case) **CONSOLIDATION ORDER**
Ashraf Elgamal, individually and as guardian ad litem for A.E, a minor; Amanda Elgamal, an adult, Plaintiffs, vs. United States of America, Defendant.	No. CV-14-040-PHX-LOA

There are several motions pending in these two related actions. On January 21, 2014, Defendants lodged a Motion to Seal and Motion for Consolidation and Transfer, requesting consolidation of these nearly identical cases presently assigned to two different judges in the

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District Court of Arizona: *Elgamal v. Johnson*, CV-13-867-PHX- GMS (LOA) ("*Elgamal I*") and *Elgamal v. United States of America*, CV-14-040-PHX-LOA ("*Elgamal II*"). (Sealed docs. 73-74) Defendants represent that Plaintiffs' counsel in both cases "[i]s not opposed to the transfer and consolidation." (*Id.* at 2) Defendants indicate both cases arise from the same facts and circumstances surrounding the withdrawal of an I-140 petition filed on behalf of Plaintiff Ashraf Elgamal. (*Id.*) The named Plaintiffs are the same in both cases, but the defendants are different in each case. The only Defendant in *Elgamal II* is the United States of America ("USA"). Also pending for rulings in *Elgamal I* are Plaintiffs' Motion for Leave to File Second Amended Complaint, doc. 65, and Defendants' Motion for Stay of Case Proceedings and Motion to Keep Case Filings Under Seal Pending Resolution of Discovery Dispute, doc. 69.

I. Background

Generally, the *pro se* Complaint in *Elgamal* I, filed on April 29, 2013, asserts *Bivens*[1] claims against several federal employees involved in the investigation of Mr. Elgamal's application for adjustment of his immigration status and his subsequent complaint to the Department of Homeland Security's ("DHS") Office for Civil Rights and Civil Liberties ("CRCL"). *Elgamal II* alleges causes of action for negligence and negligent supervision against Defendant USA, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2670-80, arising out of the Government's processing of Mr. Elgamal's application for adjustment of status and subsequent complaint to CRCL. The facts alleged by Plaintiffs in both cases are virtually identical. The Complaint in *Elgamal II* was lodged under seal on January 9, 2014, pending the Court's ruling on whether it should be filed under seal, and indicates that, *inter alia*, on or about July 5, 2013, Plaintiffs filed administrative claims with U.S. Citizenship and Immigration Services ("USCIS") as required by the FTCA. (Sealed doc. 2, ¶ 7 at 2) *Elgamal I* was referred to the undersigned Magistrate Judge for all

[1] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

appropriate pretrial matters pursuant to Rule 72(a), Federal Rules of Civil Procedure, and LRCiv 72.1(a). (Doc. 47) *Elgamal II* was randomly assigned to this Magistrate Judge pursuant to LRCiv 3.7(a)(1).

Plaintiffs' counsel first appeared in *Elgamal I* on June 5, 2013, and, shortly thereafter, filed the First Amended Complaint, which is presently sealed pending resolution of the parties' discovery dispute discussed later herein. (Docs. 8-9) Defendants' counsel appeared in *Elgamal I* on July 12, 2013, not long after service and review of the First Amended Complaint. (Doc. 18) Defendant USA appeared in *Elgamal II* when it lodged and requested sealing of its Motion for Consolidation and Transfer on January 21, 2014. To date, no defendant has answered or otherwise responded to the complaint in either case.

Since mid-July 2013, counsel in *Elgamal I* have been embroiled in a discovery dispute regarding the return of an alleged privileged document, known as the "Lilly Memorandum," inadvertently disclosed to Plaintiffs during discovery in a related case, *Marcella Mata and Ashraf Elgamal v. Janet Napolitano, etc.*; *et al.*, CV-12-289-PHX-ROS ("*Mata*"). The *Mata* case was dismissed without prejudice by a different Arizona District Judge on July 15, 2013. (Doc. 18 in CV-12-289-PHX-ROS) On July 19, 2013, the assigned District Judge in *Elgamal I* granted Defendants an extension to answer until after the resolution of the parties' Lilly Memorandum dispute, referred the discovery dispute to the undersigned Magistrate Judge for resolution, and ordered all documents disclosing the details of the Lilly Memorandum sealed until further order of the Court. (Doc. 23 at 3)

Relying on Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure 26(b)(5)(B), and (c), the *Elgamal I* Defendants requested a protective order, directing Plaintiffs to gather and return to defense counsel all copies of the disputed Lilly Memorandum until the Court decides the issues regarding its use, asserting the Lilly Memorandum is protected from discovery by the deliberative-process and attorney-client privileges. (Sealed doc. 20 at 1-2) On December 23, 2013, and following express Ninth Circuit authority that a district court lacks the power to issue a valid protective order to compel the return of documents obtained through discovery in a separate action, this

Magistrate Judge denied without prejudice Defendants' request that a protective order issue in *Elgamal I* for discovery inadvertently disclosed in the *Mata* case. (Sealed doc. 63) (citing *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074 (9th Cir. 1988); *Whittaker Corp. v. Execuair Corp*., 736 F.2d 1341, 1347 (9th Cir. 1984)). The docket for the *Mata* case reflects that, on January 10, 2014, Defendants filed, *inter alia*, a Motion to Reopen and Motion for Protective Order. (Docs. 55; sealed doc. 56, CV-12-289-PHX-ROS) The time for briefing has not expired.

On January 9, 2014, Plaintiffs moved for leave to file a Second Amended Complaint in *Elgamal I*. Plaintiffs represent "[t]he primary purposes [for amendment is] adding Jeffrey S. Blumberg and Margo Schlanger as individual defendants, streamlining the *Bivens* causes of action, adding allegations concerning the statute of limitations, and updating information that has been discovered since the filing of the First Amended Complaint." (Sealed doc. 66) Defendants have not filed any opposition to Plaintiffs' requested amendment, but have filed a Motion for Stay of Case Proceedings and Motion to Keep Case Filings Under Seal Pending Resolution of Discovery Dispute. (Doc. 69)

For the reasons discussed below, the Court will grant the consolidation motion, conditionally grant Plaintiffs' amendment request, and deny Defendants' motion to stay these proceedings pending the parties' dispute regarding the Lilly Memorandum in the *Mata* case.

II. Consolidation

"Under Rule 42(a) of the Federal Rules of Civil Procedure, consolidation is appropriate '[i]f actions before the court involve a common question of law or fact.'" *Hall v. Medicis Pharmaceutical Corp*., 2009 WL 648626, at *1 (D. Ariz. March 11, 2009). In determining whether consolidation is appropriate, a district court "must balance the interest of judicial convenience against the potential for delay, confusion and prejudice that may result from such consolidation." *Sapiro v. Sunstone Hotel Investors, L.L.C.*, 2006 WL 898155, at *1 (D. Ariz. April 4, 2006); *see also In re Adams Apple, Inc*., 829 F.2d 1484, 1487 (9th Cir. 1987); *Monolithic Power Systems, Inc. v. O2 Micro Intern. Ltd*, 2006 WL

2329466, at *1 (N.D. Cal. 2006) (granting consolidation where common questions of law and fact exist and judicial economy would be served). "Factors such as differing trial dates or stages of discovery usually weigh against consolidation." *Sapiro*, 2006 WL 898155, *1 (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2383 (1995). "[T]he risk of inconsistent adjudications of common factual and legal issues" generally weighs in favor of consolidation." *Id.* (citing *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993)) (citations omitted). A district court has broad discretion to determine whether consolidation is appropriate. *Investors Research Co. v. U.S. Dist. Court for Cent. Dist. Of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989).

Under LRCiv 42.1(a), the consolidation or transfer of cases to a single judge is permissible whenever two or more cases are pending before different judges on the grounds that such cases: "(1) arise from substantially the same transaction or event; (2) involve substantially the same parties or property; (3) involve the same patent, trademark, or copyright; (4) call for determination of substantially the same questions of law; or (5) for any other reason would entail substantial duplication of labor if heard by different Judges." "Because the standard for transfer under LRCiv 42.1 is similar to the standard for consolidation under Fed.R.Civ.P. 42(a), the Court has broad discretion in deciding a motion to transfer under LRCiv 42.1(a)." *Addington v. US Airline Pilots Ass'n*, 2010 WL 4117216, at *1 (D. Ariz. Oct. 19, 2010) (citations omitted).

Based upon these standards, consolidation of *Elgamal I* and *II* is appropriate. These actions undisputedly involve common questions of law and fact. Consolidating these actions into one will enhance the efficiency of their resolution rather than litigating them separately. Consolidation would conserve the time and effort of counsel and the district court, avoid unnecessary expenses in resolving two separate lawsuits, and avoid the potential of inconsistent outcomes. *Elgamal I* and *II* will be consolidated.

III. Amendment

Federal Rule of Civil Procedure 15(a)(2) provides, in relevant part, that "[t]he court should freely give leave when justice so requires." "In deciding whether justice requires

granting leave to amend, factors to be considered include the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Despite the passage of nine months that *Elgamal I* has been pending, the Defendants have still not answered or otherwise responded to the First Amended Complaint as the parties' have spent an inordinate amount of time and effort on the claw back issue related to the Lilly Memorandum. Overall, both *Elgamal I* and *Elgamal II* are in their infancy. There has been no discovery between the parties in *Elgamal I*, the Rule 16 case management conference has not been scheduled, and, of course, a trial date has not been set. Granting Plaintiffs' conditional leave to amend to file a Second Amended Complaint to add two new defendants and the FTCA claims alleged in *Elgamal II*, but without any mention of the Lilly Memorandum, as if it had not inadvertently been disclosed in the *Mata* case, will not cause undue delay of either consolidated case or undue prejudice to either Plaintiffs or Defendants. Moreover, there is no evidence of Plaintiffs' bad faith or a dilatory motive by moving to amend at this time and, without a developed record, it is too early in the litigation to determine whether the claims to be alleged in the Second Amended Complaint are futile. Plaintiffs' request for leave to file a Second Amended Complaint will be conditionally granted. Moreover, if the Second Amended Complaint does not mention the Lilly Memorandum, as if it had not inadvertently been disclosed in the *Mata* case, good cause will not exist for so many requests that pleadings and other filings be filed under seal, which unduly complicate the adjudication of the issues in these cases.

IV. Motions to Stay

Defendants request a stay of all case proceedings and deadlines in the lead case "[u]ntil the discovery dispute is resolved in *Mata*[]" and "that all documents filed in this case remain under seal." (Doc. 69 at 1-2)

A district court has discretion to stay civil proceedings in the interest of justice and

in the light of the particular circumstances of the case. *Grubbs v. Irey*, 2008 WL 906246, at *1 n. 5 (E.D. Cal. March 31, 2008) (citing *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980)). In determining whether a stay is appropriate, a district court should consider the particular circumstances and competing interests involved, such as:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Keating v. Office of Thrift Supervision, 45 F.3d 322, 325 (9th Cir. 1995). It is within the district court's discretion, however, to grant or deny a stay after weighing these factors. *Id*.

Here, there is no parallel criminal prosecution to warrant staying these civil cases to protect a defendant's constitutional rights. Staying these consolidated cases is neither reasonable nor necessary. If the Second Amended Complaint were to make no reference to the Lilly Memorandum, as if it had not inadvertently been disclosed in the *Mata* case, there would be no risk of prejudice to Defendants by disclosing confidential information that is arguably privileged. Assuming Defendants obtain a claw back protective order in *Mata*, whether the Lilly Memorandum is properly discoverable thereafter or even admissible in evidence are issues that need not be resolved at this pleading stage nor must the purported privileged portions of the Lilly Memorandum be alleged in a complaint to state a claim for relief under Rule 12(b)(6), Fed.R.Civ.P. Further, granting the broad stay requested by Defendants is inconsistent with the Civil Justice Reform Act's, 28 U.S.C. § 471 *et seq*., attempt to facilitate a speedier adjudication of civil cases and Rule 1's directive that "[t]hese rules . . . should be construed and administered to secure the just, *speedy*, and inexpensive determination of every action[.]" (emphasis added) Moreover, staying these consolidated cases denies the Plaintiffs the reasonably expeditious resolution of their claims; may exacerbate their damages, if liability exists; and delays the public's interest in the exposure

of the alleged governmental misconduct of USCIS immigration officers.

Defendants' request "that all documents filed in this case remain under seal" is overly broad and contrary to the public's "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n. 7 (1978); *see also In Re Copley Press, Inc.*,518 F.3d 1022, 1028 (9th Cir. 2008) (The public's qualified right to access can be overcome if "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.") (citation omitted). Moreover, because the public's right is not absolute, it does not apply to "documents which have traditionally been kept secret for important policy reasons." *Id*. (citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)).

The Ninth Circuit has made clear that a party seeking to seal a judicial filing bears the burden of overcoming the strong presumption of openness by meeting the "compelling reasons" standard before a filing may be properly sealed. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). Admittedly, there is "an exception to the presumption of access to judicial records for a sealed discovery document attached to a non-dispositive motion, such that the usual presumption of the public's right of access is rebutted." *Id*. (internal quotation marks, brackets, emphases and citations omitted). The party seeking to seal a discovery document or a document attached to a non-dispositive motion is only required to meet the lower standard of "good cause" pursuant to Fed.R.Civ.P. 26(c). *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003).

After considering all the *Keating* factors and in the exercise of its wide discretion, this Magistrate Judge will deny Defendants' request to stay this action and that all documents filed in this case remain under seal.

Good cause appearing,

IT IS ORDERED that Plaintiffs' Motion to Seal Complaint, doc. 1, in CV-14-040-PHX-LOA is **GRANTED**, *nunc pro tunc*, to January 9, 2014, and unsealing this action

(*Elgamal II*), except the Complaint itself, doc. 2, shall remain **SEALED**.

IT IS FURTHER ORDERED that Defendants' Motion for Consolidation and Transfer, sealed doc. 74, is **GRANTED**. The Clerk of Court is kindly directed to consolidate the following two cases: *Elgamal v. Johnson*, CV-13-867-PHX-GMS (LOA) (*Elgamal I*) and *Elgamal v. United States of America*, CV-14-040-PHX-LOA (*Elgamal II*). These cases shall be consolidated into the lead case under Case No. CV-13-867-PHX-GMS (LOA). The parties are hereby directed to utilize only the lead case number and its caption with the addition of United States of America as a defendant on all future filings until further order of the Court.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Second Amended Complaint, doc. 65, is conditionally **GRANTED**, provided Plaintiffs comply with this Order. The Second Amended Complaint, however, must not be the same one lodged under seal on January 9, 2014, doc. 66, but rather, it must include all causes of action Plaintiffs elect to allege in *Elgamal I* and *II*, without any mention of the Lilly Memorandum, as if it had not inadvertently been disclosed in the *Mata* case. The Second Amended Complaint must be initially lodged, not filed as a public document, **within 10 days** of the entry of this Order and promptly served on Defendants. Within **7 days** of service, Defendants may file an objection under seal solely on the issue whether the Second Amended Complaint complies with this Order regarding the Lilly Memorandum. Absent a timely objection by Defendants, the Clerk of Court is kindly directed to file the Second Amended Complaint as a public document. Defendants' time to answer or otherwise respond to the Second Amended Complaint is from the filing of the Second Amended Complaint.

IT IS FURTHER ORDERED that Plaintiffs are conditionally granted leave to file a different amended complaint than the one lodged on January 9, 2014 in *Elgamal I* as explained herein.

IT IS FURTHER ORDERED that Defendants' Motion for Stay of Case Proceedings and Motion to Keep Case Filings Under Seal Pending Resolution of Discovery Dispute, doc. 69, are **DENIED**. All documents filed under seal before the date of this Order

shall remain sealed until further order of the Court.

The Clerk of Court shall provide copies of this Order to all counsel of record.

Dated this 30th day of January, 2014.

Lawrence O. Anderson
United States Magistrate Judge