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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

ROBERT CARL PATRICK KEANE, *et*  
*al.*,

Plaintiffs,

v.

SETH M. MCMULLEN, *et al.*,

Defendants.

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No. C 07-04894 SBA

**ORDER**

[Docket Nos. 47, 56, 84, 104, 107, 108, 131 &  
133]

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**REQUEST BEFORE THE COURT**

Before the Court is defendant Seth M. McMullen's Federal Defendants' Administrative Motion to Continue Trial (the "Motion") [Docket No. 131], defendant Paul Accornero's Joinder in the Motion [Docket No. 133], and plaintiffs Robert Carl Patrick Keane's and Chieko Strange's Opposition to the Motion (the "Opposition") [Docket No. 132]. McMullen seeks a stay under the Servicemembers Civil Relief Act (the "SCRA"), 50 App. U.S.C. §§ 501 *et seq.* McMullen is the lead defendant in this matter. Because he has been activated for military duty and will be deployed overseas for over a year, materially affecting his and his co-defendants' defense, the Court GRANTS the Motion.

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**BACKGROUND**

This suit arises from the execution of search and arrest warrants at plaintiffs' home, in December 2006, by DEA agent McMullen, Petaluma Police Officers John Silva and Paul Accornero, other officers, and Marin County Sheriffs personnel. An unknown individual attempted to send six pounds of marijuana from a Petaluma Mail Depot to a Kerry Keane in Brick Township, New Jersey. The package had a return address for plaintiffs' home and the sender's name was "C. Keane." Prior to shipping, Mail Depot determined the package contained narcotics and contacted the Petaluma Police Department. It contacted McMullen, who opened an investigation. After confirming the validity of the return address, he obtained plaintiff Keane's picture from the California Department of Motor Vehicle's database. He then showed it to the Mail Depot owner, who identified it as

1 depicting the shipper. McMullen arranged for the package's controlled delivery, and the recipient  
2 claimed that he had a brother, "Chris Keane." Based on this information, McMullen obtained search  
3 and arrest warrants from the Sonoma County Superior Court. He then led a team of police officers,  
4 including Silva and Accornero, and sheriffs deputies in executing the warrants at plaintiffs' home.

5 Plaintiffs claim that without identifying himself or his law enforcement status, McMullen led  
6 the team in a no-knock entry into their home, and then at gunpoint, forced them to the floor, face  
7 down, for handcuffing. Plaintiffs have difficulty specifically identifying what subsequent conduct  
8 was committed by which of McMullen's team members, but they focus on McMullen and Silva in  
9 alleging that: excessive force was used to handcuff them; someone placed a boot on Strange's head  
10 (she is 63 years old); Keane was lifted off the floor by his handcuff chains; McMullen and Silva  
11 were intimidating; plaintiffs were humiliated by individual interrogations while sitting on the toilet;  
12 *et seq.* Further, plaintiffs allege that McMullen knew that the New Jersey recipient had denied  
13 knowing who sent the marijuana, and that McMullen should have shown photos of other persons, in  
14 addition to Keane's photo, to the Mail Depot owner. They thus conclude that McMullen never had  
15 probable cause to obtain a search warrant. Plaintiffs only make one specific allegation against  
16 Accornero: he searched the house with a dog, after he admonished Keane in an allegedly  
17 intimidating manner that upon detecting the scent of narcotics, the dog could damage property, in  
18 attempting to uncover the source of the scent. Defendants have disputed all these claims.

19 No narcotics were found, but McMullen allegedly had Keane arrested by local authorities.  
20 He and Silva allegedly also had a female officer search Keane, to humiliate him, while in custody.  
21 The Sonoma County District Attorney charged Keane with possession of marijuana for sale, but  
22 later dismissed the charges.

23 On September 20, 2007, plaintiffs sued defendants, and on February 19, 2008, they filed a  
24 First Amended Complaint. They claim defendants violated either 42 U.S.C. § 1983, *Bivens v. Six*  
25 *Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or both, by  
26 conducting an unreasonable search and seizure, making an unlawful arrest, using excessive force,  
27 and interfering with their "zone of privacy," in violation of various combinations of their Fourth,  
28 Fifth, and Fourteenth Amendment rights.

1 McMullen and Silva have each filed a Motion for Summary Judgment, or in the Alternative,  
2 for Summary Adjudication [Docket Nos. 47, 56] and have each filed an Augmented and Renewed  
3 Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment [Docket  
4 Nos. 107-08]. Accornero has also filed a Motion for Summary Judgment. *See* Docket No. 104.  
5 Trial is set for March 23, 2009. *See* Docket No. 40.

6 On February 4, 2009, McMullen filed the Motion before the Court, requesting a stay under  
7 the SCRA. *See* Docket No. 131. The Motion indicates that the Department of the Navy recalled  
8 him to active duty, in support of Operations Noble Eagle and Enduring Freedom, as of January 23,  
9 2009, and ordered him to report to Navy Operational Support Center in San Diego. Mot. Ex. "1."  
10 He will be on active duty for 420 days, with extensions possible for up to 24 months. *Id.* According  
11 to his counsel, McMullen is currently out of state, in extensive training, and will be in Iraq or  
12 Afghanistan in March.

### 13 **LEGAL STANDARD**

14 Section 522(a) of 50 App. U.S.C. applies to any civil proceeding in which a party is (1) in  
15 military service, or is within 90 days after their termination of service, and (2) has received notice of  
16 the proceeding. Section 522(b)(1) specifies that a court may on its own motion, or shall upon  
17 application by a servicemember, stay a proceeding for not less than 90 days, if the application  
18 satisfies two conditions in § 522(b)(2). These conditions are that the application shall contain (1) a  
19 letter or other communication establishing that the servicemember's military duty materially affects  
20 their ability to appear and stating when they will be available to appear, *id.* § 522(b)(2)(A); and (2) a  
21 letter or other communication from the servicemember's commanding officer stating that the  
22 servicemember's military duty prevents their appearance and that leave is not authorized at the time  
23 of the letter, *id.* § 522(b)(2)(B).

24 Although subdivision (b)(1) uses the term "shall," a continuance is not mandated solely upon  
25 finding an applicant qualifies under § 522(a). *Boone v. Lightner*, 319 U.S. 561, 565-69 (1943). The  
26 Court has the *discretion* to determine whether a servicemember is entitled to a stay under  
27 subdivision (b)(2). *Id.* As the Supreme Court has held, however:

28 The [Act] is always to be liberally construed to protect those who have been

1 obliged to drop their own affairs to take up the burdens of the nation. The discretion  
2 that is vested in trial courts to that end is not to be withheld on nice calculations as to  
3 whether prejudice may result from absence, or absence result from the service.

4 Absence when one's rights or liabilities are being adjudged is usually prima facie  
5 prejudicial.

6 *Id.* at 575.

### 7 ANALYSIS

8 The Court finds that the SCRA applies to this matter, as McMullen has been called to active  
9 duty, effective January 23, 2009. *See id.* § 522(a). Further, there is no dispute that McMullen led  
10 the investigation which gave rise to this suit. Nor is it disputed that he obtained the warrants and led  
11 the team of local law enforcement personnel which allegedly engaged in all the conduct which gave  
12 rise to this suit. Nor is it disputed that plaintiffs' allegations are aimed primarily at McMullen and  
13 Silva, and only slightly at Accornero. As such, McMullen's testimony regarding his personal  
14 knowledge and percipient observations will be critical to defendants' case in chief. Further, the jury  
15 will not be able to assess his credibility, in comparing the versions of events each side will put forth,  
16 without McMullen's live testimony. As such, McMullen's presence at trial is not only material to  
17 his defense, but to that of his co-defendants' as well. The Court thus finds that McMullen's military  
18 duty materially affects his ability to appear and his and his co-defendants' ability to defend  
19 themselves in this matter. *See id.* § 522(b)(2)(A).

20 Plaintiffs claim that McMullen could have cured any prejudice by videotaping his deposition.  
21 Opp'n at 1. The Court, however, declines to read the Rules of Evidence as establishing the  
22 boundaries of the SCRA, as plaintiffs provide no evidence that this would implement Congress'  
23 intent that the SCRA be "liberally construed to protect those" called to defend their country. *See*  
24 *Boone*, 319 U.S. at 575. While plaintiffs also note that a stay will deny them an earlier disposition,  
25 the Court notes that this matter was only filed in September 2007, and that Congress has considered  
26 this delay in their calculus when enacting the SCRA. As courts have held, under the SCRA, "[t]he  
27 possibility of detriment to parties who are not in the military service is not a controlling factor to be  
28 considered in passing upon a motion for a stay of proceedings[.]" *Cont'l Ill. Nat. Bank & Trust*

1 *Co. v. Univ. of Notre Dame Du Lac*, 394 Ill. 584, 69 N.E.2d 301, 305 (1946). Likewise, “[a] stay  
2 will be granted, in spite of the possibility that plaintiffs may suffer by not being able to prosecute  
3 their claims in the courts and the sacrifice is one of those which must be made in war for the  
4 common good.” *Craven v. Vought*, 43 D. & C. 482, 484-85 (Pa. Ct. C.P. 1942).<sup>1</sup>

5 While McMullen has not at this time produced a letter or other communication from his  
6 commanding officer regarding his leave status, *see* § 522(b)(2)(B), he need not do so, to obtain a  
7 stay. Not only does the Court have the inherent power to control its docket, the SCRA provides the  
8 Court may grant a stay on its own motion, when a servicemember is a party to a suit, and their  
9 absence would materially prejudice its prosecution. *See* § 522(b)(1). As such, courts routinely grant  
10 stays under the SCRA, when they are sufficiently convinced that a stay is necessary to avoid undue  
11 prejudice to a party’s prosecution of a matter. *See, e.g., U.S. v. Smith*, No. CIV-04-859-C, 2006 WL  
12 2338267, \*1-\*2 (W.D. Okla. Aug. 10, 2006) (unreported); *Hunt v. United Auto Workers Local 1762*,  
13 No. 4:04CV02304 GH, 2006 WL 572805, \*1-\*2 (E.D. Ark. Mar. 7, 2006) (unreported) (noting  
14 SCRA is administered to accomplish substantial justice); *Advanced Litig., LLC v. Herzka*,  
15 No. Civ.A. 19789-NC, 2004 WL 1949292, \*1-\*2 (Del. Ch. Aug. 20, 2004) (unpublished). Given the  
16 facts and circumstances of this matter and of McMullen’s deployment in the service of his country,  
17 the Court will liberally construe the SCRA to accomplish justice among all the parties, including  
18 defendants who would unquestionably be materially prejudiced in the absence of a stay.

## 19 CONCLUSION

20 The Court GRANTS defendant Seth M. McMullen’s Federal Defendants’ Administrative  
21 Motion to Continue Trial [Docket No. 131] and GRANTS defendant Paul Accornero’s Joinder in the  
22 Motion [Docket No. 133]. Further, the Court DENIES as moot, without prejudice to refile at a  
23 later date when the stay is lifted, defendant McMullen’s Motion for Summary Judgment, or in the  
24 Alternative, for Summary Adjudication [Docket No. 56]; defendant John Silva’s Motion for  
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27 <sup>1</sup> The Court does not address plaintiffs’ counsel’s speculations regarding the New Years’ Eve  
28 shooting involving a Bay Area Rapid Transit police officer. Opp’n at 2. Nor does the Court address  
counsel’s *undeclared* assertions regarding statements allegedly made by McMullen’s counsel  
regarding proceeding in McMullen’s absence, *id.*, given that McMullen’s counsel has *declared* that  
defendants initially considered this option, then declined to pursue it, Mot., Simmons Decl. ¶ 2.


1 Summary Judgment, or in the Alternative, for Summary Adjudication [Docket Nos. 47]; defendant  
2 Paul Accornero's Motion for Summary Judgment [Docket No. 104]; McMullen's Augmented and  
3 Renewed Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment  
4 [Docket No. 107]; Silva's Augmented and Renewed Motion for Summary Judgment, or in the  
5 Alternative, for Partial Summary Judgment [Docket No. 108]; and the Federal Defendants' Motion  
6 for Administrative Relief to File a Response to Plaintiffs' Contingent Rule 56(f) Requests for Relief  
7 [Docket No. 84].

8 This matter is STAYED. All pending dates in this matter are VACATED. Defendant  
9 McMullen shall notify the Court immediately upon the termination of his activity military status, as  
10 to what date will be the 90th day after the termination of his active military status.

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IT IS SO ORDERED.

February 11, 2009

  
Saundra Brown Armstrong  
United States District Judge