

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

<p>AARON TOBEY,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="padding-left: 40px;">v.</p> <p>JANET NAPOLITANO, et al.,</p> <p style="padding-left: 40px;">Defendants.</p> <hr style="width: 100%;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Civil Action No. 3:11cv154-HEH</p>
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**FEDERAL DEFENDANTS’ MOTION TO STAY
THE SCHEDULING ORDER AND BRIEF IN SUPPORT THEREOF**

The federal defendants, sued in their official and individual capacities, respectfully move to stay paragraph 1 of the Scheduling Order issued by the Court on July 5, 2011 (docket # 37). Paragraph 1 of the Scheduling Order requires the federal defendants to file an answer within 11 days, or by July 19, 2011. Because the federal defendants responded to plaintiff’s Amended Complaint on June 27, 2011, through a Federal Rule of Civil Procedure 12(b)(1) and (6) Motion to Dismiss, they should not have to file an answer until after the Court rules on the pending dispositive motion.

In this action, plaintiff alleges that certain federal officials violated his First, Fourth, and Fifth Amendment rights when he removed his clothing and displayed the text of the Fourth Amendment on his chest upon entering the security screening checkpoint prior to boarding a flight from Richmond International Airport. The Amended Complaint states claims against Janet Napolitano, Secretary of the Department of Homeland Security (DHS), and John Pistole, Administrator of the Transportation Security Administration (TSA), in their official capacities and also names two Transportation Security Officers (TSOs), “Rebecca Smith” and Terri Jones”

in their official as well as individual capacities. In the June 27, 2011 Motion to Dismiss, the federal defendants raised arguments to dismiss all claims in plaintiff's Amended Complaint based on sovereign immunity on behalf of the official capacity defendants and qualified immunity on behalf of the individual capacity defendants.

On July 5, 2011, the Court issued its Order Setting Pretrial Conference and Scheduling Order. Paragraph 1 of the Scheduling Order contains the following provision. "Any party which has not filed an Answer to the Complaint shall do so within eleven (11) days after entry of this Scheduling Order." Pursuant to this provision of the Scheduling Order, defendants' Answer would be due July 19, 2011. This deadline fails to acknowledge that, if the Court grants defendants' pending Motion to Dismiss, the necessity of filing an answer could be moot.

Accordingly, there is a direct conflict between Fed. R. Civ. P. 12(b) and the provision in paragraph 1 of the Scheduling Order. The federal defendants respectfully submit that, in light of the nature of this litigation and the interests designed to be protected by affording the United States and its officers immunity from suit, they should be afforded the opportunities set forth in Rule 12(b)(1) and (6) to postpone the filing of an Answer until after such time as the Court has ruled on the pending Motion to Dismiss. Thus, the federal defendants respectfully request that the time for the filing of their Answer be deferred until 14 days after a ruling on the motion to dismiss, should the Court deny that motion.

Counsel for the federal defendants has contacted counsel for the plaintiff and for the State defendants. Plaintiff's counsel stated that plaintiff would not object to the federal defendants' request to stay the provision of the Scheduling Order regarding filing of an Answer during the pendency of the federal defendants' motion to dismiss, contingent upon the federal defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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