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

AARON TOBEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:11cv154-HEH**
	)	
JANET NAPOLITANO, et al.,	)	
	)	
Defendants.	)	
	)	

MOTION FOR STAY OF DISCOVERY PENDING A DECISION ON DISPOSITIVE MOTION AND BRIEF IN SUPPORT THEREOF

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. In response to the Amended Complaint, the individual federal defendants, Rebecca Smith and Terri Jones (collectively, the Transportation Security Officers (TSOs)), and the official federal defendants filed a motion to dismiss (docket # 33). The federal defendants now respectfully move this Court under Federal Rule of Civil Procedure 26(c) to stay all discovery until the Court has ruled on that pending dispositive motion to dismiss.

The motion to dismiss the claims against the TSOs sued in their individual capacity raises qualified immunity. Qualified immunity carries with it a protection from pretrial procedures such as discovery. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). Therefore, when an individual defendant asserts qualified immunity in a threshold motion, a court should not allow discovery until it has considered that threshold motion and determined what discovery, if any, is

necessary. *Id.; Harlow v. Fitzgerald,* 457 U.S. 800, 817-18 (1982). Because the TSOs have asserted qualified immunity in a threshold motion, this Court should stay discovery until it has considered that motion. Similarly, one purpose of sovereign immunity is to protect a sovereign government from the burdens of suit, including discovery. *Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009). The official federal defendants'' assertion of sovereign immunity, therefore, also supports a stay of discovery until this Court has decided the threshold motions. *Id*.

ARGUMENT

I. QUALIFIED IMMUNITY PROTECTS THE TSOS FROM DISCOVERY WHILE THEIR THRESHOLD MOTION IS PENDING

Qualified immunity "protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow*, 457 U.S. at 818). Qualified immunity is designed to protect against the "substantial social costs" that result from suits for damages against individual officers, *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), including the "substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed," *Iqbal*, 129 S. Ct. at 1953. Because these costs accrue regardless of a case's ultimate outcome, the Supreme Court "‘repeatedly [has] stressed'" that courts should apply qualified immunity "‘at the earliest possible stage in litigation.'" *Pearson*, 129 S. Ct. at 815 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). *Accord Dunbar Corp. V. Lindsey*, 905 F.2d 754, 763 (4th Cir. 1990). "[E]ven such pretrial matters as discovery are to be avoided if possible, as ‘[i]nquiries of this kind can be

peculiarly disruptive of effective government.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817) (alteration in original). Indeed, the "basic thrust" of the doctrine is "to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 129 S. Ct. at 1953 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

Therefore, as the Supreme Court has long since made clear, when an official raises the defense of qualified immunity, discovery bearing on the merits of the claim against that official should not proceed until the threshold question of immunity is resolved. *See Pearson*, 129 S. Ct. at 815 ("[T]he driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery") (internal quotation marks omitted, alteration in *Pearson)*; *Mitchell,* 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to a dismissal before the commencement of discovery."); *Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed."). The Supreme Court has underscored the importance of this protection from discovery by holding that the denial of such protection is immediately appealable under the collateral order doctrine. *See Iqbal*, 129 S. Ct. at 1945-46; *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996).

In this case, the TSOs have asserted qualified immunity in a threshold motion to dismiss. *See* Docket # 33. The federal defendants have presented arguments that call into doubt whether plaintiff can state a claim against the individual defendants, let alone overcome their qualified immunity. If, after consideration of the motion to dismiss, this Court decides that at least some

of the claims should proceed, then discovery may go forward. Allowing discovery to proceed in the interim, however, would prematurely deprive the TSOs of the protection of qualified immunity.

Plaintiff should not be permitted to circumvent the protection of qualified immunity by proposing that he be allowed only "limited" or "jurisdictional" discovery. To begin with, discovery against the official defendants on jurisdictional issues is also inappropriate. *See infra* Part II. But even if it were not, the Supreme Court has rejected the "careful-case-management approach" under which limited discovery proceeds while threshold qualified immunity motions remain pending. *Iqbal*, 129 S. Ct. at 1953-54. In *Iqbal*, the Court emphasized its concerns with the "costs of diversion" imposed by individual-capacity suits. *Id*. at 1953. And the Court explained:

> It is no answer to these concerns to say that discovery for petitioners [senior-level federal officials] 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.

Id.

In this case, even "limited" or "jurisdictional" discovery would place this impermissible burden on the TSOs. Many of plaintiff's claims against the official defendants are premised on the TSOs' conduct. *See, e.g.,* Am. Compl. ¶¶ 100, 106, 113. Any discovery on those claims would inevitably affect the TSOs' interests. Even claims not premised on the TSOs' conduct may involve discovery that would implicate their interests. For example, any discovery on the reasons why the RIC Police came to the screening checkpoint area and what actions they took after they

arrived necessarily would involve depositions of plaintiff and the Commission defendants, which the TSOs certainly would need to monitor. The TSOs should be free from these burdens until this Court has considered their threshold assertion of qualified immunity, and therefore no discovery should go forward in the interim.

II. NO DISCOVERY SHOULD PROCEED ON THE CLAIMS AGAINST THE OFFICIAL FEDERAL DEFENDANTS WHILE THEIR THRESHOLD MOTION IS PENDING

The official federal defendants have asserted a different sort of immunity — sovereign immunity — but this assertion of immunity also supports a stay of discovery while the threshold motions are pending. Like qualified immunity, sovereign immunity "is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery." *Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009); *accord Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1190 n.11 (10th Cir. 2010) (expressing "concerns about burdening the potentially sovereign party with discovery"). A plaintiff seeking discovery "bears the burden of showing its necessity" and "is not entitled to jurisdictional discovery if the record shows that the requested discovery is not likely to produce the facts needed to withstand a Rule 12(b)(1) motion." *Freeman*, 556 F.3d at 341-42; *accord Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987). "This is particularly true where the party seeking discovery is attempting to disprove the applicability of an immunity-derived bar to suit." *Id.* at 342. Until plaintiff has carried his burden of showing the necessity of discovery to respond to this jurisdictional defense, he is not entitled to any discovery. *See id.*; *accord Mesa v. United States*, 123 F.3d 1435, 1439 (11th Cir. 1997). Therefore, until this Court has considered the official federal defendants' threshold motion and determined what discovery, if any, plaintiff may

seek, no discovery against these defendants should proceed.

Counsel for the federal defendants has conferred with counsel for plaintiff and for the Commission defendants. Counsel for plaintiff, Anand Agneshwar, has advised that, in light of the January 2012 trial date, he opposes an open-ended motion for a stay of discovery, but that he would not object to a one-week extension of time under Local Rule 26 for the federal defendants to serve objections to plaintiff's discovery requests served on August 16, 2011. Counsel for the Commission defendants, Paul Jacobs, has advised that he does not oppose the federal defendants' motion for a stay of discovery, but that discovery between plaintiff and the Commission defendants should move forward.

WHEREFORE, until this Court has determined that plaintiff's claims against the federal defendants should not be dismissed, the principles of qualified and sovereign immunity protect the official and individual federal defendants from discovery. Therefore, this Court should stay discovery until it resolves the pending dispositive motion.

DATED this 17th day of August, 2011.

Respectfully submitted,

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By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 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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