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.	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR STAY OF DISCOVERY

Plaintiff Aaron Tobey hereby files this memorandum in opposition to the motion to stay discovery filed by Defendants Janet Napolitano, John Pistole, Rebecca Smith, and Terri Jones (collectively "Federal Defendants").

The Federal defendants fail to recognize that the facts relating to the roles and participation of the relevant actors in the seizure and arrest of Aaron Tobey are wholly integrated among the Federal and Commission defendants. In such circumstances, not only is the need for discovery particularly acute (s*ee Alston v. Parker*, 363 F.3d 229 n.6 (3d Cir. 2004), the Federal actors possess relevant, material and properly discoverable information regarding the claims made against the Commission defendants, whether or not the Federal defendants are dismissed from the case. A stay of discovery would therefore not only be inappropriate, it would unduly prejudice plaintiff's preparation for trial.[1]

[1] Contrary to the Federal defendants' assertions, consideration of the Federal defendants qualified immunity defenses is premature given the insufficient factual record. *See Hydrick v. Hunter*, 500 F.3d 978 (9th Cir. 2007).

The assertion that the proposed stay will eliminate adverse "social costs" to the Federal defendants runs contrary to the very authority upon which they rely. Even with a stay, the Federal defendants and Federal counsel would nevertheless be required to participate in the discovery involving the Commission defendants, including depositions of the Commission defendants and Mr. Tobey. Thus, as the Supreme Court said in *Ashcroft v. Iqbal* , 129 S.Ct. 1937, 1953 (2009) (paraphrasing), "it would prove necessary for [the Federal defendants] 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 [the Federal defendants] are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery."

In sum, the proposed bifurcation of discovery would chop the case into the unmanageable pieces that the Supreme Court has eschewed, would visit undue prejudice on plaintiff in discovering facts necessary for trial, and would not avoid the ostensible harms of which the Federal defendants so vigorously complain. *Id*.

Fact discovery in this case ends on November 25, 2011, and trial begins on January 18, 2012. In light of the foregoing, Plaintiff's counsel advised counsel for the Federal Defendants that as an alternative he would consent 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). Accordingly, Plaintiff respectfully requests that the Court deny the Federal Defendants' motion for an unconditional stay of discovery and, instead, issue an order extending by one week the Federal Defendants time to serve objections to Plaintiff's discovery requests.

Dated this 29th of August, 2011.

Respectfully submitted,

By: /s/ James J. Knicely

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011, the foregoing Plaintiff's Opposition to Defendants' Motion for Stay of Discovery was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to:

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