

**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 RESPONSE CLARIFYING POSITION ON DEFENDANTS’
MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL**

and

**MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT
UNDER SEAL**

Plaintiff Aaron Tobey hereby files this response clarifying his position on the motion for stay of proceedings pending appeal filed by Defendants Rebecca Smith and Terri Jones (collectively the “TSOs”) and further requests leave to file under seal his Second Amended Complaint containing the actual name of Defendant Jane Doe.¹

Position on Motion to Stay

While Plaintiff believes that federal government’s appeal and unwillingness to participate in discovery renders a stay necessary, we respectfully request the Court to decide Defendant Jane Doe’s pending motion to dismiss the Second Amended Complaint. That decision can then be incorporated into the appellate proceedings in the interests of judicial economy and to “materially advance the ultimate termination of the litigation. . . .” *Cf.* 28 U.S.C. § 1292(b). Plaintiff has also been preparing a motion for

¹ Plaintiff was provided with Jane Doe’s full name immediately after he had filed his response to Defendant Jane Doe’s motion to dismiss this suit on Friday, November 4, 2011.

reconsideration of this Court's August 30, 2011 Order based on discovery received to date, including leave to amend the complaint to reflect the additional facts obtained during discovery. If we file the motion before the Court rules on the stay motion, we leave to the Court's discretion whether to rule on it then or when and if the case is remanded.²

Motion For Leave to File Second Amended Complaint Under Seal

In its October 2, 2011, Order granting Plaintiff leave to file the Second Amended Complaint, the Court directed Plaintiff "within ten (10) days of learning Jane Doe's full name, to notify the Court and seek further leave to amend his complaint accordingly." Plaintiff hereby advises the Court that his counsel received the full name of Defendant Jane Doe on November 4, 2011, and hereby requests leave to file under seal a supplemental Second Amended Complaint in the form previously filed, but containing in lieu of pseudonyms for Defendants Rebecca Smith, Terri Jones and Jane Doe, the actual names of said Defendants.

Dated this 8th of November, 2011.

Respectfully submitted,

By: /s/ James J. Knicely
James J. Knicely (VSB #19356)

² For the Court's information, the status of discovery at the time of the filing of the interlocutory appeal was as follows: (i) Plaintiff and the Commission Defendants were scheduling depositions of four additional Commission witnesses, including one Defendant, (ii) none of the three Federal Defendants had been made available for depositions, despite repeated requests, (iii) two outstanding document subpoenas of this Court served on the University of Cincinnati Police Department and the U. S. Department of Homeland Security for response on November 4, 2011, were pending (and have as of this filing gone unanswered), and (iii) Plaintiff was in the process of serving a University of Cincinnati police lieutenant and a former airport police dispatcher with deposition subpoenas. Given the prejudice to Plaintiff from incomplete discovery, it is respectfully submitted that further proceedings beyond those mentioned above, and a motion to show cause and/or to compel production of the subpoenaed documents, would be inappropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2011, the foregoing Plaintiff's Response Clarifying Position On Defendants' Motion For Stay Of Proceedings Pending Appeal and Motion For Leave To File Second Amended Complaint Under Seal 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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