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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency, et al. Defendants.	NO. 4:19-cv-05210-RMP PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY ON EQUAL PROTECTION CLAIM NOTED FOR: JUNE 4, 2020 Without Oral Argument

I. INTRODUCTION

After comprehensive briefing on the Plaintiffs States' motion to compel, this Court agreed that Plaintiffs are entitled to discovery on their Equal Protection claim. In seeking to stay the Court's Order, Defendants recycle many of the same arguments they made in opposing Plaintiffs' motion to compel. The Court has already rejected those arguments and should do so again here. Having long delayed filing any responsive pleading, Defendants cannot meet their heavy burden of showing that good cause exists to stay discovery, and their motion to stay (ECF No. 213) should be denied.

II. BACKGROUND

Plaintiff States filed this action on August 14, 2019. *See* Compl. (ECF No. 1). Among other claims, the Amended Complaint asserts that the *Inadmissibility on Public Charge Grounds* Final Rule issued by the U.S. Department of Homeland Security, 84 Fed. Reg. 41,292 (Aug. 14, 2019), violates the Equal Protection component of the Fifth Amendment because it was motivated by an unlawful intent to discriminate on the basis of race, ethnicity, or national origin. Am. Compl. (ECF No. 31) ¶ 430.

Even though this case has been pending for over nine months, Defendants have yet to file a responsive pleading of any kind. Instead, Defendants asked this Court to first resolve a series of discovery disputes *before* setting a schedule for dispositive motion briefing, as they asserted the Court's decisions on discovery

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"could impact the schedule for dispositive motions and the scope of such motions." ECF No. 193, at 3–4.

Accordingly, the parties briefed two discovery issues, including whether Plaintiffs are entitled to discovery on the Equal Protection claim. Last month, the Court granted Plaintiffs' motion to compel, ruling that "discovery regarding the States' equal protection claim is warranted under the Federal Rules of Civil Procedure." ECF No. 210 at 20.

Following the Court's ruling, Defendants announced they now intend to proceed with moving to dismiss Plaintiffs' claims. *See* ECF No. 211 at 2. Almost three weeks after the Court entered its Order granting Plaintiffs' motion to compel, Defendants filed this motion to stay discovery indefinitely pending resolution of their "upcoming motion." ECF No. 213 at 2.

III. ARGUMENT

A. Discovery Should Proceed Unless Defendants Can Show Good Cause For A Stay

A stay of a prior court order "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). Courts generally consider four factors in determining whether to stay a prior order: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties

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interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434).

Similarly, a party seeking to stay discovery under Federal Rule of Civil Procedure 26 "carries the heavy burden of making a strong showing why discovery should be denied." *Ministerio Roca Solida v. U.S. Dep't of Fish & Wildlife*, 288 F.R.D. 500, 503 (D. Nev. 2013) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). Blanket motions to stay discovery pending a decision on a motion to dismiss are disfavored. *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011); *see also Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) ("notion" that motion to dismiss stays discovery is "directly at odds with the need for expeditious resolution of litigation").

B. Defendants' Latest Round Of Delay Tactics Fall Far Short Of Carrying Their Burden To Show A Stay Is Warranted

Defendants have not carried their heavy burden of establishing that a stay of discovery is warranted.

First, the sequencing from which Defendants seek relief is entirely of their own making. Defendants have been free to file a motion to dismiss for months but have chosen to do so only now, after the Court ruled that discovery may proceed.

As early as November 2019, Defendants represented that they "intend to move to dismiss Plaintiffs' claims," but the parties agreed that the Court should

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not set a schedule for dispositive motion briefing until after production of the administrative record. Joint Report (ECF No. 188) at 7. After the record was produced,[1] Defendants agreed that certain discovery disputes—including this one regarding Plaintiffs' Equal Protection claim—should be resolved before the Court adopted a deadline for dispositive motions and Defendants' responsive pleading. Joint Status Report (ECF No. 193) at 2. Defendants specifically noted that even though they were "planning to move to dismiss Plaintiffs' claims," the Court should first decide these discovery issues, because that decision "could impact the schedule for dispositive motions and the scope of such motions." *Id.* at 3–4. Defendants also agreed that "[t]he schedule for resolution of this case will be impacted by the outcome of" Plaintiffs' Motion to Compel. *Id.*

Now that the Court has ordered discovery, however, Defendants reverse course, arguing that *no* discovery is appropriate until *after* their not-yet-filed motion to dismiss has been decided. *See* ECF No. 213 at 2–4. According to Defendants, their forthcoming motion to dismiss is so "likely to succeed" that discovery should be stayed indefinitely, despite the Court's previous order directing the parties to proceed. *Id.* at 3. This change in position begs the question

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[1] Plaintiffs are reviewing the administrative record and reserve their rights to seek further completion as appropriate.

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why Defendants did not raise these purportedly dispositive defenses sooner.[2] The forthcoming motion will likely take months to resolve, and Defendants' deliberate choice to wait until now to file their motion—and to seek a stay of all discovery in the meantime—frustrates "the just, speedy, and inexpensive determination" of this dispute. Fed. R. Civ. P. 1. Defendants' current view—that resolution of a theoretical motion to dismiss will shape the course of discovery—is also entirely inconsistent with their earlier position that discovery issues needed to be resolved *before* dispositive motions could be filed. Defendants cannot have it both ways as to whether discovery or dispositive motions should come first.

Second, even absent the particular litigation history in this case, the pendency of a motion to dismiss does not justify a complete stay of all discovery. "Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect." *Skellerup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600–01 (C.D. Cal. 1995). Instead, a stay of discovery is justified only where the court is "*convinced* that the plaintiff will be unable to state a claim for relief." *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (emphasis added).

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[2] Indeed, these same Defendants filed a motion to dismiss in related litigation as early as January of this year. *See Cook County v. Wolf*, No. 1:19-cv-06334, ECF Nos. 124, 146 (N.D. Ill. Jan. 16, 2020).

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In arguing otherwise, Defendants rely entirely on out-of-Circuit authority. *See* ECF No. 213 at 1–2; *see also* ECF No. 210 at 6–7 (contrasting D.C. Circuit and Ninth Circuit precedent). But that is not the law here. *See supra* at 3; *see also Palmason v. Weyerhaeuser Co.*, No. C11-0695RSL, 2011 WL 13101278, at *1 (W.D. Wash. Oct. 13, 2011) (denying to stay discovery pending resolution of motion to dismiss and noting "statutory presumption in favor of discovery"); *In re Valence Tech. Sec. Litig.*, No. C 94-1542-SC, 1994 WL 758688, at *2 (N.D. Cal. Nov. 18, 1994) (denying to stay discovery pending challenge on the pleadings where movant failed to show "a clear case of hardship or inequity to justify a stay"); *TNG Entm't, LLC v. Wynn Las Vegas, LLC*, No. 2:15-CV-00933-RFB, 2015 WL 5562701, at *1 (D. Nev. Sept. 21, 2015) ("[T]he fact that a dispositive motion is pending is not a situation that in and of itself would warrant a stay of discovery.").

As to the likelihood of success on their forthcoming motion, Defendants point only to the "deferential" rational basis standard they contend applies to Plaintiffs' discrimination claim. ECF No. 213 at 3. But a party's "conclusory" assertion that it will prevail on a future motion "does not satisfy Rule 26(c)'s good cause requirement," because "[s]uch general arguments could be said to apply to any reasonably large civil litigation . . . [and] would undercut the Federal Rules' liberal discovery provisions." *Skellerup*, 163 F.R.D. at 600.

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What is more, this Court has already held that the applicable standard has no bearing on whether Plaintiffs may take discovery. Whether Plaintiffs may face a heavier burden to prove their claim—a matter Plaintiffs continue to dispute, ECF No. 200 at 8—does not deprive them of the opportunity to build a factual record to carry that burden. ECF No. 210 at 19 ("[T]he Court agrees that the level of deference impacts only how the Court will eventually consider the evidence, not whether the States are entitled to the discovery they seek."). Like the privilege log issue, Defendants have failed to "make an adequate showing" in "predicting that [their] forthcoming motion to dismiss will be resolved in their favor." ECF No. 219 at 4.

Nor are decisions in related litigation to the contrary. In the California cases, the court directed last fall that the parties address the availability of Equal Protection discovery before defendants filed their motion to dismiss. *See* Tr. at 14 (Nov. 14, 2019, ECF No. 138), Case No. 4:19-cv-04975-PJH (N.D. Cal.). Moreover, the concern the court expressed about "blindly authoriz[ing]" "wide-ranging discovery," *California v. U.S. Dep't of Homeland Sec.*, No. 19-CV-04975-PJH, 2020 WL 1557424, at *16 (N.D. Cal. Apr. 1, 2020), is not present here. Plaintiffs seek only "limited discovery into circumstantial and direct evidence of discriminatory intent," as required under the legal framework that applies to Equal Protection claims. ECF No. 195 at 15.

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As to the Supreme Court's January order, the stay pending appeal of preliminary injunctions issued in the New York litigation says nothing about the merits of Plaintiffs' Equal Protection claim here. *See* ECF No. 219 at 3–4 (explaining that "merits" of claims addressed in preliminary injunction appeals are still "an open question" before this Court). The one-paragraph decision does not explain the Court's basis for granting the stay, which just as likely depended entirely on factors other than likelihood of success, such as balance of equities or irreparable harm. *See Wolf v. Cook County, Illinois*, 140 S. Ct. 681, 682 (2020) (Sotomayor, J., dissenting from grant of stay application) (noting, with respect to stay application in New York cases, that "[n]o Member of the Court discussed the application's merit apart from its challenges to the injunction's nationwide scope").

Finally, Defendants' generalized objections are premature. ECF No. 213 at 4–5. That Defendants may claim privilege at some point in the future with respect to particular discovery requests does not amount to good cause to stay any and all discovery Plaintiffs may serve. Likewise, claims that certain requests are too burdensome or not "proportional to the needs of the case" under Fed. R. Civ. P. 26(b)(1) can be addressed as necessary through the ordinary process for resolving discovery disputes. *See Neill v. All Pride Fitness of Washougal, LLC*, No. C08-5424RJB, 2009 WL 10676369, at *1 (W.D. Wash. May 21, 2009) (typical process for serving and objecting to discovery requests allows "the court

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[to] zero in on the discovery requests and the objections and rule specifically" on the issues raised). Even if Defendants are intent on raising these objections, they must do so in reference to specific discovery requests. *See Moore v. King Cty. Fire Prot. Dist. No. 26*, No. C05-442JLR, 2005 WL 8172569, at *1 (W.D. Wash. Oct. 26, 2005) (party objecting to discovery "bears the burden of pointing out specific discovery requests and explaining the basis of its objection to them"). Defendants offer no reason why a blanket stay is required in place of raising and addressing any individual questions of burden or privilege in the normal course.

IV. CONCLUSION

Defendants' motion to stay the Court's Order authorizing discovery on Plaintiffs' Equal Protection claim should be denied.

RESPECTFULLY SUBMITTED this 18th day of May, 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 18th day of May, 2020.

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