UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

KRISTEN FRY, Plaintiff, v. SCHOOL DISTRICT NO. 1 d/b/a DENVER PUBLIC SCHOOLS, *et al.*, Defendants.	No. 24-cv-02284-DDD-TPO

PLAINTIFF'S RESPONSE IN OPPOSITION TO THE DISTRICT DEFENDANTS' MOTION TO STAY DISCOVERY [ECF No. 89]

Introduction

In early 2023, Defendants Anderson, Quattlebaum, Gaytan, and Esserman faced a crisis. Policies they had developed for years—policies that reduced disciplinary enforcement and accountability in the Denver Public Schools ("DPS")—backfired spectacularly, leading to two horrific shootings at DPS's East High School. The outcry was swift and impassioned, but Defendants' counter-reaction was even stronger. As school staff and members of the community spoke up against their policies, Defendants lashed out; first against a principal, and then against Plaintiff Kristen Fry, and then against numerous others, in a clear pattern of retaliation meant to intimidate their opponents into silence during an election year.

Ms. Fry received the harshest treatment of all. She was subjected to a false hate crime prosecution and intense official and coordinated public shaming for alleged conduct that demonstrably never took place. The brazenness of the falsehoods leveled against Ms. Fry underscores just how desperate Defendants were to stop the bleeding. Defendants could not tolerate opposition, so they shut it down any way they could.

Ms. Fry deserves swift justice. Yet the District Defendants, without providing any sworn declaration or other evidence related to the burden of discovery, seek to stay literally all discovery that would establish the veracity of Ms. Fry's allegations, and would at least start the process of mending her tattered reputation. And, as important as Ms. Fry's interests are, even more important is the need to swiftly undo the *public damage* that Defendants have caused to the marketplace of ideas. Defendants' retaliation against Ms. Fry was not primarily about punishing her personally; it was about sending a message to *other* parents and community members that they could be next if they joined her cause. The longer this lawsuit takes to play out, the longer that implicit threat will remain in place.

Stays of discovery are always disfavored. But in some cases, balancing the applicable *String Cheese Incident* factors may be a close call. Not so here; this case is easy. The harm of delaying this lawsuit—to Ms. Fry personally, but even more to the marketplace of ideas—vastly outweighs any cognizable interests on the other side of the scale.

And there are other, independent, factors that also place this case outside the mainstream. As the Court has already held, there are serious concerns about the preservation of evidence. Add that this matter involves an unusually large amount of non-traditional, ephemeral evidence—social media posts, instant messaging, and private direct messaging, to name a few—and the case against a stay is only strengthened further.

Argument

I. Standard of Review

Motions to stay are heavily disfavored. "[T]he right to proceed in court should not be denied except under the most extreme circumstances." *Robert W. Thomas & Anne McDonald Thomas Revocable Trust v. First W. Trust Bank*, No. 11–cv–03333–WYD–KLM, 2012 WL 3400532, at * 3 (D. Colo. Aug. 14, 2012)(cleaned up); *see also Aspen Corporations, Inc. v. Gorman*, No. 1:18-cv-01325-CMA-SKC, 2019 WL 266313, *1 (D. Colo. Jan. 18, 2019).

The presumption against stays applies "[e]ven in cases where defendants raise a qualified immunity defense." *McGinn v. El Paso Cnty.*, 640 F. Supp. 3d 1070, 1074 (D. Colo. 2022); *see also Sgaggio v. Diaz*, No. 22–cv–02043–PAB–MDB, 2023 WL 22188, *1 (D. Colo. Jan 3, 2023). With this presumption in mind,

> courts in this district evaluate motions for a stay under the . . . *String Cheese Incident* . . . factors [which] are (1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

Integrity Applied Sci., Inc. v. Clearpoint Chemicals LLC, No. 1:18-CV-02235-DDD-NRN, 2023 WL 11904273, at *1 (D. Colo. July 18, 2023)(Domenico, J.)(citing *String Cheese Incident, LLC v. Stylus Shows*, Inc., No. 02–CV–01934–LTB–PA, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006)). Defendants cannot prevail unless "unique circumstances" are present. *See Crocs, Inc. v. Joybees, Inc.*, No. 1:21-cv-02859-GPG-SBP, 2023 WL 8851997, *12 (D. Colo. Dec. 8, 2023).

Here, the District Defendants seek a blanket stay of discovery merely because they have moved to dismiss the complaint, and because some of them (but not all) have asserted qualified immunity against Plaintiff's First Amendment claims.[1] They also assert that the *String Cheese Incident* factors support a stay. Defendants are wrong on all points.

II. The mere filing of a motion to dismiss or assertion of qualified immunity does not justify a stay of discovery.

First, globally, Defendants argue that a stay is warranted merely because they filed a motion to dismiss, and that, if the motion is granted, some discovery may be unnecessary. ECF 89 ("DefBr.") at 3-4 (arguing only that Defendants have filed a motion to dismiss and that "allowing discovery to proceed on all issues . . . would [therefore] be wasteful and burdensome in light of the possibility of dismissal."). But as courts routinely recognize, the fact that granting a pending motion to dismiss could reduce discovery burdens is a truism, and does not, on its own, justify a stay. *See Advanced Exteriors, Inc. v. United Servs. Auto. Ass'n*, No. 21-CV-01817-WJM-NYW, 2022 WL 1239250, at *4 (D. Colo. Apr. 27, 2022)("A motion to dismiss for failure to state a claim under Rule 12(b)(6) *does not* present extraordinary circumstances so as to find

[1] Only Defendants Quattlebaum, Gaytan, Esserman and Anderson have asserted qualified immunity. DefBr. at 6. The other Defendants, including DPS itself, have no ability to invoke qualified immunity.

that Defendants will be unduly burdened if they must partake in discovery prior to the ruling on the Motion to Dismiss.")(emphasis added).

Nor does an invocation of qualified immunity on behalf of some of the District Defendants justify a stay. There is no automatic stay that attaches to the assertion of qualified immunity. *See Minter v. City of Aurora*, No. 20-cv-02172-RM-NYW, 2021 WL 735910, at *5 (D. Colo. Feb. 25, 2021); *Sanchez v. City and Cty. of Denver*, No. 19-cv-02437-DDD-NYW, 2020 WL 924607, *4-5 (D. Colo., Feb. 26, 2020); *Est. of Goodwin v. Connell*, No. 17-CV-01124-PAB-MLC, 2017 WL 6561153, at *2 (D. Colo. Dec. 22, 2017). And, importantly, an assertion of qualified immunity can never justify a stay of discovery into the "facts pertinent to the [qualified immunity] defense." *Peterson v. Cty & Cnty. of Denver*, No. 21-cv-01804-RMR-SKC, 2022 WL 1239327, at *2 (D. Colo. Apr. 27, 2022)(cleaned up).

Here, questions of fact are central to Defendants' assertion of qualified immunity. Among other things, Plaintiff has pleaded that the individual District Defendants engaged in a conspiracy with Defendants Coates and Shofner to suppress and retaliate against the expression of certain viewpoints critical of their governance of the public schools. Defendants do not (and cannot) contest that acts in furtherance of that conspiracy, including such things as bringing false criminal charges against Ms. Fry in retaliation for her speech, support a First Amendment retaliation claim. Instead, the District Defendants pin their entire defense on the argument that they did not, as a matter of fact, engage in concerted action with Coates and Shofner. But that issue—the existence or not of a conspiracy—is hotly contested, and is one of the primary areas of inquiry for discovery.

The imperative to move forward with discovery on these issues is underscored by the fact that, in the instant motion, the District Defendants seek to stay *all* discovery, including discovery

from Defendants Coates and Shofner. DefBr. at 5. Given that the District Defendants have otherwise sought to distance themselves as far as possible from Defendants Coates and Shofner in a bid to undermine Plaintiff's conspiracy allegations, this request gives away the game. It is hard to resist the conclusion that the District Defendants are concerned that discovery from Coates and Shofner will substantiate Plaintiff's conspiracy allegations, which would be the end of the their primary defense.

Separately, where qualified immunity defenses apply to some, but not all, claims, and the claims share a common core of facts, discovery should proceed. In *Minter*, the court explained that concerns about qualified immunity disappear when other claims "may proceed through discovery notwithstanding the Individual Defendants' successful invocation of qualified immunity [and s]ome or all of the Individual Defendants are likely material witnesses." 2021 WL 735910, at * 5 (citation omitted); *see also Sgaggio*, 2023 WL 22188, at * 4 n.2. Defendants do not raise qualified immunity defenses to all of Plaintiff's claims, including claims against the District, and claims against Coates and Shofner. Accordingly, even if all of the individual District Defendants were able to shield themselves with qualified immunity, they would still be required to participate in this litigation, because they are witnesses to the remaining claims for which qualified immunity cannot provide a defense. *See, e.g.*, *Love v. Grashorn*, No. 21-cv-02502-RM-NRN, 2022 WL 1642496, at * 5 (D. Colo. May 24, 2022). For these reasons, the mere filing of a motion to dismiss and/or invocation of qualified immunity does not support a stay. If Defendants are to prevail, they must show that the *String Cheese Incident* factors balance in their favor. *See Integrity Applied Sci., Inc.,* 2023 WL 11904273, at *1. This, they most definitely cannot do.

III. The *String Cheese Incident* factors weigh strongly against staying discovery.

Each of the five *String Cheese Incident* factors weighs against Defendants' request.

A. Plaintiff's interests heavily favor proceeding with discovery.

The first *String Cheese Incident* factor—the plaintiff's interests and potential prejudice from a delay—weighs strongly against a stay. First, Defendants have destroyed Ms. Fry's reputation with false accusations of racism and committing a hate crime assault. It is only by vindicating her rights in this lawsuit that she will be able to begin the process of rehabilitating herself in the eyes of her community. Delay itself represents prejudice to Ms. Fry.

Second, Ms. Fry's ability to successfully litigate her case is under increasing pressure from one day to the next. As the District Defendants acknowledge, both "documentary evidence" and "witness testimony" will be relevant. DefBr. at 4. But contrary to Defendants' unsupported assurances that a blanket stay of indeterminate length will be just fine, neither of those sources of evidence can confidently be said to be secure, and each will be subject to increasing risk of loss over time. To take the documentary evidence first: as the Court has already held, Ms. Fry has "articulate[d] specific concern[s] over the actual or potential loss of relevant evidence" in this matter, including "a reasonable basis to believe that Defendant Coates may be deleting [relevant social media] posts." ECF No. 73 at 7-8; *see also* ECF 96, Tr. of Feb. 20, 2025 Proceedings 32:1-3 ("[I]f you read the plaintiff's motion, there were unique concerns that the plaintiff raised [about potential destruction of evidence] that I found to be justified in granting [a preservation] order."). Those concerns included Mr. Coates seeking information on how best to "scrub" social media accounts, and concerns that specific prior social media posts Mr. Coates had submitted to the Court to contest service of process were no longer available. Pl's Mot. for Preservation Order, Dkt. 62 at 3-4.

Even aside from those specific concerns, at the heart of Ms. Fry's complaint are allegations that the Defendants engaged in a conspiracy to suppress and punish certain speech.

Conspiracies, of course, have a "secretive nature," *Zinna v. Cook*, No. 06-CV-01733-CMA-CBS, 2010 WL 3604170, at *11 (D. Colo. June 2, 2010), *report and recommendation adopted*, No. 06-CV-01733-CMA-CBS, 2010 WL 3604386 (D. Colo. Sept. 7, 2010), *aff'd*, 428 F. App'x 838 (10th Cir. 2011), which makes concerns about evidentiary loss all the more pressing. That this matter will involve a substantial amount of non-traditional, ephemeral ESI—including social media posts, direct electronic messages, personal electronic device data, and the like—makes the concerns over evidentiary loss even stronger.

The District Defendants note that they will make initial disclosures even if a stay is entered. DefBr. at 4. But that in no way minimizes the prejudice of delay. Those disclosures will consist of documents hand-picked by Defendants' counsel to *support Defendants claims and defenses*, Fed. R. Civ. P. 26(a)(1)(A), and cannot substitute for discovery into the realities underlying Defendants' self-serving version of events.

Witness testimony, too, is subject to loss over time. "[M]emories of parties and witnesses are likely to fade—or otherwise be[come] unavailable." *McGinn*, 640 F.Supp.3d at 1076. While it is true that documentary evidence (if not spoliated or withheld) will be fundamental to Ms. Fry's proof at trial, it is not true that witness testimony is "secondary" or unimportant, as the District Defendants assert. DefBr. at 4. It will take testimony to get a clear picture of why Mr. Coates falsely accused Ms. Fry of committing a hate crime; it will take testimony to understand the pattern of retaliation against not only Ms. Fry, but school personnel (including former middle school principal Kurt Dennis), students, and other parents; it will take testimony to establish the outrageous and damaging nature of the public scolding that the District Defendants meted out against Ms. Fry following the alleged assault. For these reasons, the first *String Cheese Incident* factor weighs strongly against this Court staying discovery.

B. Defendants have not shown any undue burden from proceeding with discovery.

The second *String Cheese Incident* factor likewise disfavors a stay. Defendants assert only a generic argument about the burden of discovery: that going forward will impose the "burden and expense of conducting discovery over claims that may ultimately be dismissed." DefBr. at 4. But this is the epitome of a conclusory, non-specific assertion of burden, which courts regularly and rightfully reject. Otherwise, stays would be the norm, rather than the exception.

"Defendants always are burdened when they are sued[.]" *Chavez v. Young Am. Ins. Co.,* No. CIVA 06CV02419PSFBNB, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007); *see also Webb v. Brandon Exp. Inc.*, No. 09-cv-00792-WYD-BNB, 2009 WL 4061827, at *2 (D. Colo. Nov. 20, 2009)("Parties always are burdened by discovery . . . That is a consequence of our judicial system and the rules of civil procedure. There is no *special* burden here.")(emphasis added). But "[t]he ordinary burdens associated with litigating a case do not constitute undue burdens." *Wells v. Dish Network, LLC*, No. 11-cv-00269-CMA-KLM, 2011 WL 2516390, at *1 (D. Colo. June 22, 2011).

Instead, to prevail on this factor, "[a] party seeking a stay . . . must ***explain in detail*** the nature and extent of the claimed burden." *Hernandez v. United Builders Svc.*, 2018 WL 11615588, at *2 (D. Colo. Dec. 21, 2018)(emphasis added). "Conclusory statements" will not do. *Decker v. Murica LLC*, No. 19-cv-00104-MSK-SKC, 2019 WL 10250758, at * 2 (D. Colo. Oct. 9, 2019). "A motion to dismiss for failure to state a claim under Rule 12(b)(6) ***does not*** present extraordinary circumstances so as to find that [Defendant] will be unduly burdened if it must partake in discovery prior to the ruling on the Motion to Dismiss." *Simental v. State Auto. Mut. Ins. Co.*, No. 21-CV-01725-CMA-NYW, 2021 WL 4947285, at *3 (D. Colo. Aug. 18,

2021)(emphasis added). Defendants have not articulated anything other than generic concerns that arise in all civil litigation.

Moreover, a stay could actually increase, rather than decrease, the burdens on Defendants. The longer that discovery that is stayed, the greater the risk that witnesses' memories will fade, documents will be lost or destroyed, and ESI will be corrupted in the ordinary course of business, or even potentially due to intentional misconduct. Courts have broad discretion to respond when a party fails to preserve relevant evidence that should have been preserved. Fed. R. Civ. P. 37(e). This can even include sanctions, such as adverse jury instructions, prohibitions on introducing certain evidence, and even outright default judgment in extreme cases.

If Defendants are later unable to produce relevant evidence that should have been preserved, they could face significant prejudice in the form of adverse inferences or other spoliation sanctions. This risk actually turns this factor against defendants, because allowing discovery to move forward promptly will mitigate the potential for lost evidence and resulting prejudice to them.

This *String Cheese Incident* factor does not favor a stay.

C. A stay would undermine, not promote, judicial economy.

The third *String Cheese Incident* factor—convenience to the judiciary—also weighs against a stay. "[S]tays—and the delay that comes with them—are usually not convenient." *McGinn*, 640 F. Supp. 3d at 1076; *Aspen Corporations, Inc.*, 2019 WL 266313, *2 ("The third factor weighs against a stay because delays resulting from a stay of discovery inconvenience courts by making the docket less predictable and, hence, less manageable.")(cleaned up); *see also Love*, 2022 WL 1642496, at *5 ("[H]aving cases just sit on the docket without any progress, adding to the already disheartening average months-to-trial statistics, is not in the Court's interest

and weighs strongly against a stay."). Moreover, staying discovery now would hamstring the parties' ability to discuss settlement, which ordinarily saves judicial resources, because they will lack basic discovery regarding the strengths and weaknesses of their positions.

The District Defendants also neglect to account for this Court's ability to provide the parties guidance and direction, which is part of the District of Colorado's strength in utilizing Magistrate Judges to their fullest effect. S*ee Love*, 2022 WL 1642496, at *5 ("Managing cases, resolving discovery disputes, and moving [] cases toward trial is what federal magistrate judges do."); *Young v. Colorado Dep't of Corr.*, No. 1:23-CV-01688-NYW-SBP, 2024 WL 4581162, at *5 (D. Colo. Oct. 25, 2024)("The court therefore does not prioritize its own convenience in assessing whether a stay is appropriate.").

This factor weighs against a stay.

D. Non-parties have an exceptionally strong interest in the prompt resolution of this matter.

Defendants say they are "unaware of any interests of third parties that would be negatively impacted by a stay in this case." DefBr. at 5. They have not been looking very hard. As explained above, this lawsuit is not like the typical contest between mere opposing private interests. It bears repeating that a primary aim and effect of Defendants' retaliation against Ms. Fry was *not exclusively to punish Ms. Fry and the other targets themselves, but to set public examples to silence others*.

The interests of non-parties, therefore, are very much in play here. By punishing and suppressing certain speech, *and getting away with it*, Defendants have distorted the marketplace of ideas. Non-parties—especially other parents and community members who would like to join Ms. Fry in opposing Defendants' policies, but are too intimidated to do so—have an interest in

seeing that situation put right.[2] This lawsuit is the means to that end, and the more it is delayed, the more prejudice is felt by non-parties.

This *String Cheese Incident* factor weighs strongly against a stay.

E. The public interest strongly favors proceeding with discovery.

Finally, the fifth *String Cheese Incident* factor regarding the public interest decisively favors allowing discovery to proceed. First, contrary to Defendants' arguments, the public always has a strong interest in swift judicial review of claims, particularly civil rights claims. *See Chavez,* 2007 WL 683973, at *2 ("[D]elay is . . . of social concern, as it . . . threatens the credibility of the justice system.")(cleaned up); *see also* Fed. R. Civ. P. 1.

Second, the public interest is even more pressing here, where the case involves not only the suppression of speech on topics of utmost public concern (including the safety and education of schoolchildren), but also retaliation in the most spectacular fashion—including through the perpetration of a hate crime hoax. This matter has therefore drawn extensive local and national media coverage,[3] including, by way of example, the following:

- Ryan Mills, *Radical Activists Nearly Ruined a Denver Mom with Racism Charge. Then the Evidence Came Out*, NATIONAL REVIEW (Sept. 3, 2024).[4]

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[2] That such people exist is not speculation. Indeed, the complaint alleges that community members have stated outright that they have been too intimidated by the retaliation against Ms. Fry to speak up themselves. ECF No. 8 (First Am. Compl.) ¶ 126.

[3] The Court may take judicial notice of the public attention this case has generated. *Love*, 2022 WL 1642496, at *6.

[4] https://www.nationalreview.com/news/radical-activists-nearly-ruined-a-denver-mom-with-racism-charge-then-the-evidence-came-out/

- Kevin Vaughan, *Woman accused of assault, using racial slur at DPS board meeting sues district, others in federal court*, 9 NEWS (Oct. 7, 2024).[5]

- Jimmy Sengenberger, *DPS muzzles a mom to placate an ally*, DENVER GAZETTE (Sept. 27, 2024).[6]

- Brian Webber, *DPS board, leaders' rush to judgment sparks federal lawsuit*, BOARDHAWK (Sept. 9, 2024).[7]

The allegations against DPS and its political operatives are serious, and the public has a vital interest in ensuring that they are promptly resolved and not kept in limbo through procedural delays. *Love*, 2022 WL 1624296, at *6; *cf. Estate of McClain by and through McClain v. City of Aurora, Colorado,* No. 20-cv-02389-DDD-NRN, 2021 WL 307505, at *4 (D. Colo. Jan. 29, 2021)(public interest not served by a stay where matter "has received widespread attention locally, state-wide, and nationally").

Third, the Board of Education seats occupied by Defendants Gaytan, Esserman, and Quattlebaum are up for election in November 2025.[8] The public deserves to know whether or not these public officials engaged in the misconduct alleged in the complaint, and this Court should not be used as an instrument in a campaign effort to hide damaging information until after November.

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[5] https://www.9news.com/article/news/education/woman-accused-of-assault-at-school-board-meeting-files-lawsuit-alleging-wrongfully-accused/73-b388e775-a3ec-4e3b-8864-3e333b4e5b75

[6] https://gazette.com/opinion/dps-muzzles-a-mom-to-placate-an-ally-jimmy-sengenberger/article_9ed3f932-7c2b-11ef-a40e-7b9827d005c1.html

[7] https://boardhawk.org/2024/09/dps-board-leaders-rush-to-judgment-sparks-federal-lawsuit/

[8] *See* https://tinyurl.com/mu9rsw47

Defendants assert generic concerns that are involved in every case, but never weigh those interests against the strong public need to swiftly resolve the claims at issue here. All of the *String Cheese Incident* factors weigh against this Court staying discovery.

IV. Even if the Court is inclined to stay some discovery, it should act with a scalpel, not a hammer.

Even if the Court were inclined to grant a stay, not all items of discovery stand on the same footing. The Court should, at a bare minimum, allow Plaintiff to do the following:

- Take full discovery from Defendant Coates, given valid concerns that evidence in his possession may be spoliated;[9]
- Take full discovery on Defendants' preservation methods. This should also include Defendants' personal devices, which are potentially outside the control of counsel for DPS.
- Take full discovery on Plaintiff's state law claims for defamation, abuse of process, and malicious prosecution, which will still go forward in a state court forum in the unlikely event the District Defendants' motion to dismiss Plaintiff's First Amendment claim is granted and the Court declines to exercise supplemental jurisdiction over the state law claims, *cf. Minter*, 2021 WL 735910, at *5 (acknowledging that, despite the assertion of qualified immunity defenses, the availability of discovery may be different for state law claims subject to the court's supplemental jurisdiction);
- Depose any DPS witnesses listed in the Parties' initial disclosures, who are either no longer employed by DPS, or who have given notice that they intend to depart.

Conclusion

All five *String Cheese Incident* factors favor allowing discovery to commence without further delay. The Court should therefore deny Defendants' request and permit this important

[9] Defendant Coates has filed a separate motion to stay all proceedings in this matter until such time as he is appointed *pro bono* counsel, if ever. ECF No. 94. Plaintiff's response to Defendant Coates' motion is forthcoming.

case to move forward. In the alternative, the Court should permit at least some discovery to proceed.

DATED this 1st day of April, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation set forth at DDD Civ. P.S. III(A)(1).

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