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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO CASTANEDA, Plaintiff, v. THE UNITED STATES OF AMERICA, ~~CALIFORNIA,~~ GEORGE MOLINAR, in his individual capacity, CHRIS HENNEFORD, in his individual capacity, ~~JEFF BRINKLEY, in his individual capacity~~, GENE MIGLIACCIO, in his individual capacity, TIMOTHY SHACK, M.D., in his individual capacity, ESTHER HUI, M.D., in her individual capacity, STEPHEN GONSALVES, in his individual capacity, CLAUDIA MAZUR, in her individual capacity, DANIEL HUNTING, M.D. , Defendants.	Case No. CV 07-07241 DDP (JCx) **ORDER DENYING MOTION TO STAY** [Motion filed on April 28, 2008]

This matter comes before the Court upon the individual Public Health Service Defendants' ("PHS defendants") motion to stay this action in its entirety pending an interlocutory appeal to the Ninth Circuit on the narrow issue of whether certain PHS defendants are entitled to absolute immunity. After reviewing the materials

submitted by the parties and considering the arguments therein, the Court DENIES the motion.

I. BACKGROUND

The facts and procedural history of this case are known to the parties and articulated in detail in the Court's Order of March, 11, 2008 denying the PHS defendants motion to dismiss on the grounds that they are immune from suit ("Order"). See Castaneda v. United States, 538 F. Supp. 2d 1279 (C.D. Cal. 2008). Accordingly, the Court will not repeat them here except as necessary.

On April 21, 2008, the Government filed a notice of appeal as to the individual PHS defendants on the question of absolute immunity.[1] Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) (acknowledging the right to an interlocutory appeal of immunity decisions). The same day, this Court requested supplemental briefing by the parties on the issues of 1) whether the matter should be stayed pending appeal; and 2) whether and to what extent the Court should allow discovery pending this appeal. On April 25, 2008, Defendant United States of America filed a Notice of Admission of Liability for Medical Negligence as to Count 1 of the Second Amended Complaint ("SAC") **only**, which alleges a Federal Tort Claims Act ("FTCA") claim for medical negligence against the United States pursuant to California's Wrongful Death and Survivor statutes. The admission of liability does not encompass the nature or extent of Plaintiff's damages.

[1] These defendants are Timothy Shack, Esther Hui, Stephen Gonsalves, Chris Henneford, and Gene Migliaccio, who are all federal Public Health Service Employees.

II. DISCUSSION

There is no dispute that the Court may not proceed with trial on the Bivens claims against the PHS defendants while the immunity question is pending before the Ninth Circuit. See Chuman, 960 F.2d at 105. Rather, the parties disagree over whether and to what extent the Court may allow discovery to proceed pending appeal of the immunity issue. The Court finds is appropriate to deny the stay and allow discovery.

A. Jurisdiction

As a threshold matter, the Court finds that it has discretion to allow discovery on all issues in this case. It is true that the filing of the interlocutory appeal "divests the district court of its control [jurisdiction] over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). Nevertheless, the Ninth Circuit has held that "an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal." Britton v. Co-op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990) (emphasis added). Therefore, the Court has no jurisdiction to consider the specific issue of the PHS defendants' immunity, or to bring those defendants asserting such immunity to trial, but retains jurisdiction to "proceed with matters not involved with the appeal." Alice L. v. Dusek, 492 F.3d 563, 565 (5th Cir. 2007). "Because discovery and other pretrial matters are not relevant to the subject of the appeal-[PHS defendants'] claim of immunity," the Court may continue to oversee discovery in this case. Schering

Corp. v. First DataBank, Inc., 2007 WL 1747115, at *4 (N.D. Cal. June 18, 2007) (unpublished).

B. Stay

1. Application of Hilton v. Braunskill

Having determined that the Court retains jurisdiction as to whether to continue discovery, the Court addresses the discovery question on the merits.

In Hilton v. Braunskill, 481 U.S. 770, 776 (1987), the Supreme Court articulated four factors regulating the issuance of a stay pending appeal:

> (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 interested in the proceeding; and (4) where the public interest lies.

The parties dispute whether the Hilton test applies to immunity cases such as this one. The Court finds that it does.

Defendants argue that Hilton applies only to cases involving preliminary injunctions. Defendants cite only one published Ninth Circuit case, Little v. City of Seattle, 863 F.2d 681 (9th Cir. 1988), to urge that the Ninth Circuit has purposefully avoided applying Hilton to immunity cases. The Court is not convinced. In that case, the Ninth Circuit addressed, in one paragraph, the propriety of the district court's stay of discovery pending an immunity appeal. Id. at 685. The court noted that district courts have "wide discretion in controlling discovery," and that in that particular case the stay furthered judicial efficiency. In context, the court was not ruling out the use of any legal standards that might be applicable, but was, rather, endorsing -

briefly - the wide discretion of the district courts. In other words, Little does not speak one way or the other to the applicability of Hilton.

The Court acknowledges that the Ninth Circuit has borrowed the test from the preliminary injunction context in applying Hilton. See Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (internal quotation marks omitted). However, nothing about Golden Gate suggests that Hilton may be applied only in the preliminary injunction context. Rather, the Ninth Circuit appears to have analogized the granting of a preliminary injunction to the granting of a stay pending appeal, and accordingly designed a similar test for both.

Further, nothing in the Supreme Court's decision in Hilton suggests that the stay standard should be limited to preliminary injunctions. In fact, Hilton itself did not involve preliminary injunctions, but rather a dispute over whether to stay, pending appeal, an order granting a prisoner habeas relief. The Court's discussion of the stay standard was not confined to any particular subject matter whatsoever, except federal civil procedure. See Hilton, 481 U.S. at 776-77 (referring to the Hilton factors as "the traditional stay factors"); see also In re World Trade Center Disaster Site Litigation, 503 F.3d 167, 169-70 (2d Cir. 2007) (applying Hilton to an immunity appeal and referring to the Hilton factors "to be considered in issuing a stay pending appeal" as "well known").[2]

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[2] Defendants' attempt to distinguish World Trade Center on procedural grounds is not convincing. Although the procedural posture in World Trade Center, unlike the case at bar, involved a

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In applying Hilton, the Ninth Circuit has explained that either of two "interrelated legal tests," may justify the granting of a stay: either "the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury," or "the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." Golden Gate, 512 F.3d at 1115 (internal quotation marks omitted) (emphasis added). In other words, "the required degree of irreparable harm increases as the probability of success decreases." Id. (internal quotation marks omitted). "Further, we consider where the public interest lies separately from and in addition to" the other factors. Id. (internal quotation marks omitted).

Applying Hilton here, the Court cannot grant a stay because the PHS defendants have not made a showing of any possibility of success on the merits of their immunity argument; the law is clear that at least "serious legal questions" as to the merits must be raised in order to justify a stay.

a. Success on the Merits

As the Court laid out in detail in the Order, 42 U.S.C. § 233(a), the immunity provision at issue in this case, explicitly incorporates by reference 28 U.S.C. § 2679. 28 U.S.C. § 2679, in turn, explicitly states that the immunity provided by the Federal

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[2](...continued)
situation where the Court of Appeals had already reviewed the immunity appeal and concluded that it likely lacked merit, the important point is that the court relied on the Hilton factors as the "well known" test for issuance of stays pending appeal in general. Nothing in World Trade Center suggests that only its unusual procedural posture justified an invocation of Hilton.

Tort Claims act "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). PHS defendants claim that § 233(a) provides them with immunity from Bivens claims – that is, from civil actions brought for a violation of the Constitution of the United States. See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (establishing that victims of a constitutional violation by a federal agent may recover damages against that federal official in federal court). Accordingly, the explicit language of § 233(a) and its cross references precludes the PHS defendants' argument.

In their motion for a stay, PHS defendants assert that they have a "significant chance of succeeding on the merits on their immunity claim" because 1) "the Court's discussion of legislative history may well miss the fact that section 233 was enacted before Bivens was decided" and 2) "numerous courts throughout the nation have applied the immunity for public health service employees who provide medical care to detainees in cases such as this." (Mot. To Stay at 6.)

As to the first point: The Order did not miss the fact that § 233(a) was originally enacted before Bivens. As detailed in the Order, § 233(a) refers potential plaintiffs to the remedies provided in the FTCA, and the FTCA was amended in 1988, through the Federal Employees Liability and Tort Compensation Act, explicitly to preserve the right to bring claims for constitutional violations, or Bivens claims. (Order 15-19.) By amending the FTCA, which § 233(a) incorporates, Congress effectively amended § 233(a)

to preserve the right to bring Bivens claims. In other words, after the Supreme Court issued Bivens, Congress, having considered Bivens, altered the FTCA and FTCA-dependent immunity statutes to ensure that Bivens claims were allowed. Therefore, the most relevant legislative history discussed in the Order is not the legislative history of § 233(a), which was indeed passed before Bivens, but rather the legislative history of the 1988 amendment to the FTCA; this legislative history conclusively establishes a congressional intent to preserve Bivens claims. (Order 23-25.)

As to the second point: The Court acknowledges that several courts have granted immunity to Public Health Service officials under § 233(a), but, as detailed in the Order, none of those courts even recognized, much less distinguished, the fact that 42 U.S.C. § 233(a) explicitly incorporates by reference the 1988 FTCA amendment, 28 U.S.C. § 2679, which explicitly exempts Bivens claims from the immunity provided by the Federal Tort Claims Act. In other words, the statutory basis this Court used in declining to immunize PHS defendants was not addressed by any of the other courts. After recognizing the controlling statutory provision, no interpretation was necessary: Congress could not have been more explicit that PHS defendants in this context are not immune from suit. This Court has no doubt that any court following the statutory trail to § 2679 would come to the same conclusion.

PHS defendants have not suggested any flaw in this Court's statutory interpretation. Relying on the fact that other courts made the same mistake as the PHS defendants in failing to acknowledge the plain language of the statute does nothing to convince this Court that its reasoning was mistaken. Moreover, the

Defendants do not now - and indeed have never once in the several motions and hearings since the Order was issued - even mention the 1988 FTCA amendment, which is the central tenet of the Court's decision denying immunity. The Court therefore finds that PHS defendants have not raised any questions – much less serious questions – about the merits of their case. They have not shown a possibility – much less a likelihood - of success.

b. Hardship

As the PHS defendants have shown no possibility of success, any potential hardship is ultimately irrelevant. Nevertheless, the Court notes that the hardship showing made by federal defendants does not outweigh the lack of a likelihood of success.

The PHS defendants argue that they will be irreparably harmed if forced to proceed with discovery pending appeal because their personal assets are at stake and they have not yet retained private counsel. The Court acknowledges that discovery can be burdensome. However, such a burden, while regrettable, does not constitute an irreparable injury. As to retaining independent counsel, if the PHS defendants are concerned about immediate discovery negatively impacting their future defense should their immunity appeal fail, the Court will grant them a reasonable amount of time to obtain independent counsel. Accordingly, the Court finds that this hardship showing, in light of the failure to show even a possibility of success on the merits, fails to satisfy the standard for a stay.

c. Public Interest

The Court finds that the public interest weighs in favor of denying the stay. This case involves allegations that, if true,

reveal serious constitutional violations. Accordingly, the public interest favors allowing the plaintiff to proceed absent a compelling reason to the contrary. In this case, PHS defendants' argument for immunity lacks merit. The Court issued a detailed opinion explaining why it is meritless, and now, in asking for a stay, the PHS defendants have provided no substantive reason to show that the opinion is flawed. Comparing the potential for success on the merits, the potential hardship involved, and the public interest, the Court finds that there is no basis to grant a stay.[3]

2. Cumulative/Duplicative

Even if the Court concluded that the Hilton test did not apply to immunity cases, the Court would nonetheless allow discovery to proceed. See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002) (noting district courts' "broad discretion . . . to permit or deny discovery" (internal quotation marks and alterations omitted)).

[3] The Court notes that counsel for Plaintiff recently submitted two supplemental declarations describing the scope of the United State's discovery production of May 2, 2008. Counsel notes that on May 11, 2008, certain pertinent emails were publicized by the Washington Post and that these emails were purportedly not included within the United State's production. There may very well be a satisfactory explanation why the emails were not produced, if indeed they were not produced. The Court takes no position on that issue herein. However, the Court is mindful that in this age of emails and electronically maintained records, discovery may present some practical challenges that were not always present in the past. These challenges include the volume of discovery brought about by the ubiquitous use of email and the varying practices by which electronic records are stored and preserved. Overcoming these challenges presents two competing considerations. First, it may take more time to complete discovery. Second, unless discovery is pursued promptly, electronic records may be lost. These considerations are important in evaluating the appropriateness of granting a stay and the Court has considered them here.

Defendants argue that discovery relating to the non-Bivens claims should be stayed because Defendant United States has already admitted liability as to the medical negligence claim in Count 1, such that further discovery would be "unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C). The Court disagrees.

First, several of Plaintiff's other claims are unrelated to the admission of medical negligence by the United States. For example, Counts 8 and 9 charge state defendants with state torts, and Count 7 charges individual state defendants with violations of 42 U.S.C. § 1983. Discovery as to these claims would not be cumulative or duplicative.

Second, contrary to Defendant United States's contention that only damages are relevant at this point, some of the claims against the United States involve factual elements that would not necessarily be covered by a general admission of medical negligence. For example, Plaintiff's Count 4 charges the United States with intentional infliction of emotional distress. An admission of medical negligence does not necessarily extend to an admission of intentional infliction of emotional distress.

Some of Plaintiff's other FTCA claims are connected with claims for medical negligence.[4] (See, e.g., Count 2, 3 - Negligent Establishment and Application of Policy for Provision of Medical Care.) However, the Notice of Admission of Liability is brief and does not provide any factual basis for the admission. It states

[4] In its Reply, the United States makes several arguments for why several causes of action contained in Plaintiff's proposed Third Amended Complaint lack merit. Until the Third Amended Complaint has been filed and questions regarding whether to dismiss it or parts thereof are directly before the Court, the Court declines to address these arguments.

simply that "the United States admits only negligence and causation on the first cause of action." It is therefore unclear to what exactly - factually speaking - Defendant United States is admitting, but it may not encompass all that Plaintiff must prove to make out the other FTCA claims.

Defendant argues without citation that if a claim (such as Negligent Establishment of Policy) is "inextricably intertwined" with a claim regarding which a defendant has admitted liability, allowing further discovery is necessarily unreasonably cumulative. However, Defendant United States could have admitted liability on all the FTCA claims. Instead, it only admitted liability as to Count 1, and did not specify the facts it intended to admit. Therefore, Plaintiff may pursue discovery on the other FTCA claims even if they involve the admitted allegations of medical negligence.

Defendant further argues that the Court should stay discovery involving the Bivens claims and Bivens defendants pending the resolution of the appeal. However, only some of the Bivens defendants - those who are Public Health Service Employees - are appealing the question of their immunity to the Ninth Circuit. Plaintiff's Bivens claims in Counts 5 and 6, however, charge all individual defendants except one with constitutional violations. The parties do not dispute that the FTCA allows Bivens claims against, for example, George Molinar, who was the Immigration and Customs Enforcement ("ICE") Officer-in-Charge at San Pedro Service Processing Center[5] and who was responsible for the care and medical

[5] San Pedro was one of the facilities where Mr. Castaneda was (continued...)

treatment received by detainees in that facility, and Claudia Mazur, who was the Managed Care Coordinator for the Western Region of the Department of Immigration Health Services. The Court declines to stay discovery involving the Public Health Service defendants because their depositions may be directly relevant to the Bivens claims against other individual federal defendants.

In addition, the Court declines to stay discovery against the PHS defendants because they would be subject to discovery regardless as third parties in Plaintiff's other, non-Bivens claims. As two (non-exhaustive) examples, Plaintiff may need to depose the Bivens defendants to proceed with discovery on both the Negligent Establishment of Policy and the Intentional Infliction of Emotional Distress claims. If the Ninth Circuit grants the PHS defendants immunity, they will not personally be liable for the conduct in this case. That conduct, however, may will be relevant regardless to Plaintiff's other claims. See Alice L., 492 F.3d at 565 (allowing discovery involving individual defendant in a Title IX claim against a school district even though defendant was asserting qualified immunity in her personal capacity because "[e]ven though the factual basis of the Title IX claims and the § 1983 claim overlap, the claims are legally distinct" and defendant "cannot assert qualified immunity from the Title IX claim against" the school district). In other words, because the individual PHS defendants are relevant witnesses even if they are found to be

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[5](...continued)
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immune in their personal capacity, allowing discovery is both appropriate and not prejudicial.[6]

III. CONCLUSION

In light of the foregoing analysis, the Court DENIES the motion, and allows discovery to proceed.

IT IS SO ORDERED.

Dated: May 20, 2008

DEAN D. PREGERSON
United States District Judge

[6] For this reason, the case relied upon most heavily by Defendants, Harlow v. Fitzgerald, 457 U.S. 800 (1982), is inapposite. Harlow and its companion case, Nixon v. Fitzgerald, 457 U.S. 731 (1982), involved a claim for money damages against former President Nixon and two of his aides for an allegedly unlawful discharge from the Air Force. In Nixon, the Supreme Court dismissed the claims against the President, holding that he was absolutely immune from suit. Id. at 756-57. The Court then, moving to Harlow, remanded for a determination of whether the relevant law was clearly established so as to trigger qualified immunity for Nixon's aides. 457 U.S. at 818-19. Because the only other claim in the case (against Nixon) had been dismissed, the remaining claims would remain viable only if Petitioners Harlow and Butterfield's immunity argument was ultimately denied. For that reason, the Court stated that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." Id. at 818 (emphasis added). In other words, the Supreme Court held that where immunity was a threshold question, discovery should be stayed. Here, by contrast, the discovery related to what happened to Mr. Castaneda, including the involvement of the PHS defendants, does not require a threshold immunity determination. If the Ninth Circuit rejects the immunity defense, PHS defendants may be liable individually; if the court grants immunity, the conduct and testimony of PHS defendants may prove the liability of the United States or other defendants. Either way, the discovery is material to this case.