

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738
T. (212) 965 2200 F. (212) 226 7592
www.naacpldf.org



Washington, D.C. Office
1444 Eye Street, NW, 10th Floor
Washington, D.C. 20005
T. (202) 682 1300 F. (202) 682 1312

November 9, 2017

VIA ECF

The Honorable Andrew L. Carter Jr.
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

**Re: NAACP Legal Defense and Educational Fund, Inc., et al. v. Trump, et al.,
17 Civ. 05427 (ALC)**

Dear Judge Carter:

Plaintiffs respectfully submit that Defendants have not established good cause to stay discovery and their motion to stay (Doc. 69) should therefore be denied.

It is well-settled that a motion to dismiss does not automatically stay discovery and that defendants bear the burden to show good cause for such a stay. *See, e.g., Mirra v. Jordan*, No. 15-CV-4100, 2016 WL 889559, at *2-3 (S.D.N.Y. Mar. 1, 2016); *see also Obiajulu v. City of Rochester, Dep't of Law*, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) ("The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the discovery rules found in the Federal Rules of Civil Procedure."). Specifically, the Court considers: (1) "[w]hether the defendant has made a strong showing that the plaintiff's claim is unmeritorious;" (2) "[t]he breadth of discovery and the burden of responding to it;" and (3) "[t]he risk of unfair prejudice" to the opposing party. *Mirra*, 2016 WL 889559, at *2. *Accord Brooks v. Macy's, Inc.*, 2010 WL 5297756, at *2 (S.D.N.Y. Dec. 21, 2010); *Hong Leong Fin. Ltd. v. Pinnacle Performance Ltd.*, 297 F.R.D. 69, 72 (S.D.N.Y. 2013). The party seeking a stay bears the burden under all three prongs. *Mirra*, 2016 WL 889559, at *2.

First, Defendants have not made the requisite "strong showing" that Plaintiffs' claims are unmeritorious, meaning they have not "identified 'substantial arguments for dismissal' of the case in its entirety." Doc. 69 at 3; *see Hong Leong*, 297 F.R.D. at 72-73 (describing the alternative formulations of the first prong as equivalent). Defendants' principal standing argument was premised on their assertion that Plaintiffs have not yet diverted resources to address the Commission. Doc. 49 at 1-2. But, Plaintiffs' Second Amended Complaint clearly alleges that Plaintiffs have already diverted and will continue to divert resources. *See* Doc. 66 ¶¶ 4-5, 8, 11-12, 15-16, 19-21, 23-25, 28-29, 32-34. Moreover, Defendants have not challenged Plaintiffs' standing based on stigmatic harm. *See* Doc. 49. While Defendants contend that the FACA claim is non-justiciable, *id.*, they rely solely on a concurrence by Judge Silberman and



“fail[] to note that the other two judges [in that case] *disagreed* with Judge Silberman.” *Cargill, Inc. v. United States*, 173 F.3d 323, 335 (5th Cir. 1999) (citation omitted); *see* Doc. 56 at 3 (explaining why FACA claims are justiciable).

Defendants are also unlikely to prevail under Rule 12(b)(6). Defendants’ only FACA argument is the justiciability one that has been rejected by the Fifth and D.C. Circuits, and Defendants have not identified any source of executive authority in response to Plaintiffs’ unauthorized presidential action claim, *see* Doc. 56 at 3. Plaintiffs have also plausibly alleged that the Commission’s creation and activities have been motivated, in part, by racial stereotypes and discrimination. Doc. 66 ¶¶ 180-201. Defendants have not presented strong (or substantial) arguments for dismissing Plaintiffs’ complaint “in its entirety.” Doc. 69 at 3.

Second, Defendants cannot show that discovery would be burdensome, as they have refused to discuss it. *Cf. Brooks*, 2010 WL 5297756, at *2 (finding it “impossible to assess both the breadth of the discovery sought and the prejudice, if any, that defendant would suffer in responding to the requests” where “no discovery requests have been served”). During the pendency of Defendants’ motion, Plaintiffs will seek document discovery limited to: (1) data collection and use and (2) selection of commission members. Much of this information has already been collected and reviewed, if not produced, by Defendants in related litigation.¹ If Defendants wish to object to specific discovery requests after they are served, Defendants may make such objections at that time.

Defendants also note “special considerations” exist when “discovery requests are directed to the Vice President and other senior Government officials.” Doc. 69 at 3 (citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 385 (2004)). But in *Cheney*, “the discovery requests . . . ask[ed] for everything under the sky,” and were “unbounded in scope.” 542 U.S. at 387-388. This is in sharp contrast to the limited discovery Plaintiffs intend to seek during the pendency of the motion to dismiss. Plaintiffs are also prepared to direct discovery, at this time, to Defendants Secretary Kobach and the Commission. Such discovery would “comport with *Cheney*,” Doc. 69 at 3, because it is not directed to any senior executive officials. In fact, on remand in *Cheney*, “federal defendants who headed agencies” complied with discovery requests to which the Vice President had objected. *In re Cheney*, 406 F.3d 723, 726 n.1 (D.C. Cir. 2005). Moreover, unlike *Cheney*, 542 U.S. at 384, this case involves a commission that is composed of non-federal

¹ *See* Defs.’ Not. of Filing re Order on Mot. for Misc. Relief, Ex. 3, Doc. Index, *Lawyers’ Comm. v. Pres. Advisory Comm’n on Elec. Integ.*, No. 17-cv-01354 (D.D.C. Sept. 29, 2017), ECF No. 33. (hereinafter “Ex. 3, Doc. Index”).



government officials and is therefore subject to FACA, 5 U.S.C. App. §3(2). There are no “special considerations” that would justify limiting document discovery requests directed to Secretary Kobach and the Commission, as FACA already imposes a broad statutory duty of disclosure on them. 5 U.S.C. app 2. §10(b).

Finally, Defendants have not met their burden of showing a lack of prejudice. Defendants argue that a “delay in discovery ‘without more’ does not amount to unfair prejudice,” Doc. 69 at 3, but here there is “more.” Plaintiffs seek injunctive relief based on claims that concern the right to vote, which “rank[s] among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Commission members themselves have emphasized the Commission’s utter lack of balance or fair process; just today, one Commission member took the extraordinary step of suing the Commission because of these problems.² Yet, the Commission appears to be continuing with its work.³ As such, unlike cases involving money damages, a delay here risks irreparable harm.

Further, the lack of discovery prohibits Plaintiffs from fully addressing, or putting in context, the Defendants’ representations that the Commission is not “investigating” voters, Doc. 49 at 3, and that the Commission has not made any plans or decisions as to data sharing with federal agencies. Oct. 13, 2017 Hr’g Tr. 3:10-16; 4:12-14 (attached hereto as Exhibit A). In fact, the Commission has stated its intention to compare state voter rolls to federal databases, including a database of non-citizens maintained by DHS. Doc. 66 ¶ 158. Further, unknown to some Commission members, the Commission employed a researcher on secondment from the Office of the Special Counsel.⁴ That researcher was involved in the collection of the state voter roll data.⁵ A Vaughn Index produced in another case also indicates the Commission has already been communicating with federal agencies including DHS.⁶ Discovery is essential so that Plaintiffs may fairly respond to the Defendants’ assertions about the Commission’s actions.

Defendants have failed to meet their burden of establishing good cause to stay discovery in its entirety.

² Jessica Huseman, *Trump Voter Fraud Commission Is Sued – By One of Its Own Commissioners*, ProPublica (Nov. 9, 2017 10:05 a.m.), <https://www.propublica.org/article/trump-voter-fraud-commission-dunlap-lawsuit>

³ *Id.* (citing email from MN Voters Alliance stating it was invited to speak at Commission’s Dec. 2017 meeting).

⁴ John Wagner, *Trump voter fraud commission researcher arrested on child pornography charges*, Wash. Post (Oct. 14, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/14/trump-voter-fraudcommission-researcher-arrested-on-child-pornography-charges/?utm_term=.8203b63b4882

⁵ See Letter from Kris Kobach (July 26, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/letter-vice-chair-kris-kobach-07262017.pdf> (“To securely submit your State’s data, please have a member of your staff contact Ron Williams on the Commission’s staff.”).

⁶ Ex. 3, Doc. Index at 36:689 and 37:705.

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Respectfully submitted,

/s/ Natasha Merle

Cc: All counsel of record (via ECF)