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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Johnny Wheatcroft and Anya Chapman, as
husband and wife, and on behalf of minors J.W.
and B.W.,

Plaintiffs,

v.

City of Glendale, a municipal entity; Matt
Schneider, in his official and individual
capacities; Mark Lindsey, in his official and
individual capacities; and Michael Fernandez, in
his official and individual capacities,

Defendants.

NO. 2:18-cv-02347-MTL

**DEFENDANTS' MOTION TO
STAY THE DEPOSITION OF
MATTHEW SCHNEIDER**

Defendants City of Glendale, Matthew Schneider, Mark Lindsey, and Michael Fernandez (“Defendants”) move for a stay of the deposition of Matthew Schneider pending the outcome of the potential criminal matter involving the same body of facts and issues. Defendants previously conferred with Plaintiffs, and proposed a stipulation to postpone the deposition of Defendant Officer Matthew Schneider, while allowing the parties to proceed with other avenues of discovery. Defendants also offered to stipulate to additional time for expert witnesses to supplement their opinions and reports following Officer Schneider’s deposition. Plaintiffs rejected this reasonable proposal, leaving Defendants no other option than to move this Court to enter an order staying Officer Schneider’s deposition.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Plaintiffs claim that Officer Schneider used excessive force in violation of the Fourth and Fourteenth Amendments during the July 26, 2017, incident at Motel 6 in Glendale, Arizona. *See* Plaintiffs’ Second Amended Complaint, Doc. 35 at 8. The United States Department of Justice and the Federal Bureau of Investigation are currently investigating Officer Schneider’s conduct stemming from this very incident for those very same events. Officer Schneider’s deposition is currently scheduled to occur on December 20, 2019. The parties understand that the criminal investigation is still ongoing and it is anticipated that a charging determination will be made in the near future. Accordingly, for the purposes of this Motion, Officer Schneider’s counsel and the Court should presume that Officer Schneider will face criminal charges arising out of the same underlying incident as this civil proceeding.

II. LEGAL ARGUMENT

A. Civil courts have the power to stay civil cases even when criminal charges have yet to be filed.

The power to stay proceedings “is incidental to the power inherent in every court to control the disposition of the cases on its docket with the economy of time and effort for itself, for counsel, and for litigants.” *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 620 U.S. 683, 706 (1997) (“The District Court has broad discretion to stay proceedings as incident to its power and control its own docket.”). Judicial economy for all parties involved in this case favors staying the deposition of Officer Schneider pending the outcome of an anticipated criminal action.

Defendants acknowledge that stays are generally granted when there are parallel criminal and civil proceedings. However, it is proper to grant the stay of a civil case even before a criminal proceeding has begun. In *Wallace v. Kato*, the United States Supreme Court touched on this issue by stating that “it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or *the*

1 *likelihood of a criminal case* is ended.” 549 U.S. 384, 393-94 (2007) (citing *Heck v.*
2 *Humphrey*, 512 U.S. 477, 487-88, n. 8 (1994)) (emphasis added). By including the phrase
3 “likelihood of a criminal case” the Supreme Court recognized in *Wallace* that it is within the
4 court’s power to stay a civil case even when criminal charges are a possibility, as here, but
5 have not yet been filed.

6 At this time, no criminal charges have been filed against Officer Schneider.
7 However, the parties know that Officer Schneider is the subject of an ongoing criminal
8 investigation stemming from the very same incident that is the subject of this civil action. Per
9 the language in *Wallace*, staying Officer Schneider’s deposition is permissible even in
10 anticipation of potential criminal charges.

11 **B. A stay of this deposition is in the interest of Plaintiffs and Defendants in**
12 **this action.**

13 In determining whether to issue a stay, the Ninth Circuit has instructed a
14 district court to weigh the competing interests involving: (1) the “possible damage which may
15 result from the granting of a stay,” (2) “the hardship or inequity which a party may suffer in
16 being required to go forward,” and (3) “the orderly course of justice measured in terms of the
17 simplifying or complicating of issues, proof, and questions of law which could be expected to
18 result from a stay.” *CMAX Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299
19 U.S. at 254-55). All three *CMAX* factors favor staying the deposition of Officer Schneider in
20 this action.

21 **1. A stay of Officer Schneider’s deposition will have minimal impact**
22 **on the parties in this action.**

23 In this Motion, Defendants only seek a stay of Officer Schneider’s deposition,
24 *not* the entire action. Therefore, there is significantly less impact on the parties than in a
25 traditional, global stay of proceedings during a parallel criminal proceeding.

26 In an effort to avoid motion practice before this Court, Defendants offered to
27 stipulate to the extension of discovery deadlines so that the stay of Officer Schneider’s
28 deposition will not impact or prejudice the parties’ claims or defenses in this action.
Specifically, Defendants offered to stipulate to expert witnesses’ offering preliminary reports

1 and opinions in the time while Officer Schneider's deposition is stayed and have further
2 agreed to stipulate that all experts will be able to supplement their reports and opinions
3 following Officer Schneider's deposition. However, given the recently filed stipulation, this
4 proposal is unnecessary.

5 The parties filed a Stipulation to Amend the Case Management Order that
6 largely mitigates any potential hardship stemming from the stay of this deposition. *See* Doc.
7 79. Specifically, the parties stipulated to extend the current deadlines by approximately 120
8 days. *Id.* As noted above, a charging determination is expected in the near future. Therefore,
9 with the additional 120 days of time to conduct depositions, a stay of this deposition while
10 waiting for the charging determination should not cause the parties to run afoul of any
11 deadlines or be otherwise prejudiced in this regard.

12 It is also critical to note that the parties already have access to statements made
13 by Officer Schneider about this incident. Officer Schneider was interviewed by a fellow
14 officer after the incident and notes from that interview were included with the Glendale
15 Police Department Report. *See* Glendale Police Department Report, CoG_WHEATCROFT
16 000001-000060 at 000019-21, attached as **Exhibit 1**. Additionally, the parties have access to
17 the audio recordings of two different interviews of Officer Schneider conducted by Sergeant
18 Matt Moody in November 2017. *See* Schneider Interview with Sergeant Moody 11/14/17,
19 CoG_WHEATCROFT 001758, attached as **Exhibit 2**; *see also* Schneider Interview with
20 Sergeant Moody 11/29/17, CoG_WHEATCROFT 001759, attached as **Exhibit 3**.
21 Therefore, expert witnesses for both parties have some information and statements from
22 Officer Schneider to consider and use in formulating any opinions that are rendered while the
23 proposed Stay is in effect and while awaiting the opportunity to depose Officer Schneider.

24 For these reasons, because Plaintiffs will not be harmed if this Court stays
25 Officer Schneider's deposition, the proposed, limited stay is appropriate.

26 **2. Officer Schneider will suffer extreme hardship and unfair**
27 **prejudice if required to submit to a deposition in this proceeding.**

28 If Officer Schneider is forced to testify in this proceeding, he will inevitably

1 suffer hardship and inequality in one form or the other. If Officer Schneider chooses to
2 testify without invoking his Fifth Amendment rights, he would risk providing evidence or
3 testimony that the authorities could use against him in a future criminal proceeding.
4 However, if Officer Schneider avoids that risk and invokes his Fifth Amendment rights, he
5 would be presented with another great hardship in the form of the adverse inference the jury
6 would be instructed to make on the basis of his invocation of rights. *See S.E.C. v. Colello*, 139
7 F.3d 674, 677 (9th Cir. 1998) (“Parties are free to invoke the Fifth Amendment in civil cases,
8 but the court is equally free to draw adverse inferences from their failure of proof.”). This
9 inevitably forces Officer Schneider to choose between protecting himself from potential
10 criminal liability and presenting the strongest possible defense in this civil proceeding for all
11 Defendants. That choice could be easily avoided by merely staying the deposition of Officer
12 Schneider until such a time as the risk of criminal exposure has passed.

13 **3. Staying Officer Schneider’s deposition will be in the best interests**
14 **of both Plaintiffs and Defendants.**

15 Permitting the stay of Officer Schneider’s deposition furthers the interests of
16 Plaintiffs and Defendants. If Officer Schneider is forced to submit to a deposition, there is a
17 significant chance that he will follow the advice of counsel and invoke his Fifth Amendment
18 right against self-incrimination. This would deprive the parties of any meaningful testimony
19 from him that could be used by expert witnesses or presented at trial to decide this case on
20 the merits. As this court well knows, public policy favors the disposition of cases on their
21 merits. *See Pagtalunan v. Galaza*, 291 F.3d 629, 643 (9th Cir. 2002). Officer Schneider is a key
22 figure in this lawsuit and his testimony will be necessary to reach a resolution of the case on
23 its merits. Therefore, allowing a deposition to proceed that would deprive the parties of that
24 testimony would run contrary to the policy that cases should be decided on their merits.

25 However, if the deposition is stayed until such a time as the risk of criminal
26 proceedings has passed, Officer Schneider would be free to testify without exposing himself
27 to great risk. In that instance, the parties would be able to solicit testimony from him for use
28 in the remainder of the civil action. The parties’ ability to do so would drastically increase the

1 likelihood that this case would be decided on its merits. The fact that staying this deposition
2 would benefit all parties weighs heavily in favor of staying the deposition.

3 **III. CONCLUSION**

4 Given the great hardship and unfair prejudice that Officer Schneider will face if
5 forced to testify in a deposition while criminal charges are still pending, the Defendants
6 respectfully request that this Court stay his deposition until such a time that this great risk has
7 passed.

8 DATED this 16th day of December 2019.

9 JONES, SKELTON & HOCHULI, P.L.C.

10
11 By s/ Joseph J. Popolizio

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14 Ian C. Beck
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18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on this 16th day of December 2019, I caused the
20 foregoing document to be filed electronically with the Clerk of Court through the
21 CM/ECF System for filing; and served on counsel of record via the Court's CM/ECF
22 system.

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