IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NAACP, ET AL.,	:	No. 3:18-cv-01094-WWE
Plaintiffs,	:	
	:	
v.	:	
	:	
DENISE MERRILL, ET AL.,	:	
Defendants.	:	OCTOBER 18, 2018

DEFENDANTS' REPLY BRIEF IN FURTHER
SUPPORT OF THEIR MOTION TO STAY DISCOVERY

Defendants have primarily argued that this Court ***must*** stay discovery until after it resolves the Eleventh Amendment defense that Defendants raised in their Motion to Dismiss.[1] *See generally* Doc. Nos. 14-1 and 15. That is because the Eleventh Amendment provides a complete immunity from suit. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). It is well established that, when a defense involving an immunity from suit is properly raised, it must be resolved before the Court can proceed one step further in the matter, which necessarily includes "such pretrial matters as discovery . . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), citing *Harlow v. Fitzgerald,* 457 U.S. 800, 817 (1982).

Plaintiffs' arguments to the contrary lack merit, and the Court should reject them.

[1] Defendants have also argued this Court ***should*** stay discovery under the ordinary standard that applies when such immunity defenses are not implicated. *See* Doc. No. 15 at 6-8. Defendants rely on the arguments made in their initial brief with regard to that issue.

First, Plaintiffs inexplicably assert that the Eleventh Amendment does not apply—and therefore cannot be a basis for staying discovery—solely because Plaintiffs seek prospective relief. Doc. No. 20 at 6, citing *Ex parte Young*, 209 U.S. 123 (1908). Contrary to that baseless assertion, it is black letter law that, to invoke the *Ex Parte Young* to the Eleventh Amendment, a plaintiff must seek prospective relief ***and*** must allege an ongoing violation of federal law. *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007); *see also, e.g. City of Shelton v. Hughes*, 578 F. App'x 53, 55 (2d Cir. 2014) (rejecting *Ex Parte Young* argument because, even though plaintiff sought prospective injunctive relief, it "fail[ed] to allege any plausible ongoing violation of federal law"). Plaintiffs simply ignore the latter of those two requirements. Moreover, Defendants have argued at length in their Motion to Dismiss that Plaintiffs have ***not*** adequately alleged an ongoing violation of federal law, and that the *Ex Parte Young* exception to the Eleventh Amendment therefore does not apply. *See generally* Doc. No. 14-1. Unless and until this Court decides the Motion to Dismiss and resolves that issue in Plaintiffs' favor, a stay of discovery is both appropriate and required.

Plaintiffs' reliance on *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland* in their opposition to the Motion to Dismiss does not compel a different result. *See* Doc. No. 21 at 26. The Supreme Court held in *Verizon* that, in conducting the *Ex Parte Young* analysis, courts do not resolve the merits of an ongoing violation of federal law ***that has been adequately pled***. 535 U.S. 635, 646 (2002), citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)

("An ***allegation*** of an ongoing violation of federal law . . . is ordinarily sufficient") (emphasis in original). However, when an ongoing violation of federal law has ***not*** been adequately alleged—as Defendants have argued is the case here—the Eleventh Amendment plainly bars the claim. *E.g. City of Shelton*, 578 F. App'x at 55. Unless and until the Court resolves the Motion to Dismiss and concludes that Plaintiffs' have adequately pled an ongoing violation of federal law, therefore, Defendants' Eleventh Amendment remains and discovery must be stayed.

Second, Plaintiffs erroneously assert that a stay is not required because Defendants have not cited any cases in which the Eleventh Amendment was the basis for staying discovery, and have instead relied on cases involving qualified immunity. Doc. No. 20 at 6 and n.2. That is both wrong and irrelevant.

As an initial matter, Defendants expressly cited and relied upon *Molina v. Christensen*, No. CIV.A.00-2585-CM, 2002 WL 69723 at *1 (D. Kan. Jan. 4, 2002), which involved an Eleventh Amendment defense and which is therefore directly on point. *See* Doc. No. 15 at 5. Plaintiffs ignore that legal authority in their brief, and they do not even attempt to address or distinguish it.

Further, and more importantly, the distinction between the Eleventh Amendment and qualified immunity is wholly irrelevant to the question at issue. ***Both*** of those defenses provide a complete immunity from suit, which includes an immunity from having to incur the cost and burden of engaging in "such pretrial matters as discovery . . . ." *Mitchell*, 472 U.S. at 526; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993). It is that specific

protection—the immunity from suit—that provides the basis for staying discovery when a qualified immunity defense has been raised. And because the Eleventh Amendment provides the same immunity from suit that qualified immunity does, the same rationale that applies to staying discovery in the qualified immunity context—"avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial"—also applies in the Eleventh Amendment context. *Puerto Rico Aqueduct*, 506 U.S. at 143-44.

CONCLUSION

The Court should stay discovery until after it has resolved the Eleventh Amendment defense raised in Defendants' Motion to Dismiss.

Respectfully submitted,

DEFENDANTS DENISE MERRIL
AND DANNEL P. MALLOY

GEORGE JEPSEN
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Michael K. Skold
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