

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,

Plaintiff,

v.

Case No. 06-cv-156 TCK - FHM

Douglas Horn, Melody Noble Nelson,
Brian Shern, and 10 Unknown Agents
of the Internal Revenue Service, and
Others Unknown,

Defendants.

**JOINT OPENING BRIEF IN SUPPORT OF MOTIONS TO DISMISS ON BEHALF
OF DOUGLAS HORN, MELODY NOBLE NELSON, AND BRIAN SHERN**

Defendants Douglas Horn, Melody Noble Nelson, and Brian Shern offer the following points and authorities in support of their motions to dismiss.

STATEMENT

Plaintiff Lindsey Springer commenced this money-damage action as a purported *Bivens* suit (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)) against Assistant United States Attorneys Douglas Horn and Melody Noble Nelson, IRS Special Agent Brian Shern, and ten other unknown IRS agents. He rests jurisdiction on the alleged presence of a federal question. 28 U.S.C. § 1331. Compl. ¶ 2.

In three counts set out at paragraphs 91 through 113, Mr. Springer seeks economic compensatory damages of \$2,000 and punitive damages of \$1 million, on the grounds that, following a September 16, 2005 execution of a search warrant at the plaintiff's residence (i)

defendant Shern and other IRS agents “stole” \$2,000 from the plaintiff (Complt. ¶ 96) and (ii) defendants Horn and Nelson thereafter opposed Mr. Springer’s motion under Federal Rule of Criminal Procedure 41 for the return of his property to “cover up” the theft. Complt. ¶ 105.

The plaintiff’s claim is as follows: Plaintiff describes himself as a well-known “penalty protestor” who is on “a mission that announces the wholesale removal of the Internal Revenue Service and all its illegal acts from being accepted and condoned by the United States Department of Justice and U.S. Department of Treasury.” Complt. ¶¶ 18-19. On September 16, 2005, at the plaintiff’s residence, defendant Shern and other IRS agents served a federal grand jury search warrant that had been authorized and signed by United States Magistrate Judge Frank H. McCarthy (Complt. ¶ 78), and there conducted a search. *Inter alia*, the agents discovered approximately \$19,000 in currency. Complt. ¶ 79. The inventory prepared after the search (which ended at 2:40 p.m.) reflected a seizure of “[a]pproximately \$19,000.00 in U.S. Currency.” Complt. Ex. 1 & Complt. ¶ 59 (“receipt”).¹

According to the plaintiff, after the execution of the search warrant ended, and after the agents gave the plaintiff the post-search inventory form showing approximately \$19,000 in currency, the sum of “\$2,000.00 disappeared between Plaintiff’s home and the depositing bank.” Complt. ¶ 98. “[O]nly \$17,000 of said seizure,” the plaintiff alleges, “actually survived from the

¹ Attachment “B” to the search warrant – signed by United States Magistrate Judge McCarthy on September 15, 2006, and filed with the Clerk of this Court on September 26, 2005, in the Matter of Search of Premises, Case No. 05-SM-1 (N.D. Okla.) – expressly included among “items to be seized”: “2. *Currency* and monetary instruments.” (Emphasis added). The warrant also extended to the only other type of property mentioned in the complaint, namely, “4. . . . documents related to the *purchase and sale of automobiles or other vehicles* or machinery.” (Emphasis added) If the Court should determine that reference to the text of the warrant is necessary, the Court may and should take judicial notice of the contents of the warrant.

search of Plaintiff's home to the depositing bank." Compl. ¶ 97. *See also* Compl. ¶ 89 ("\$19,000 when it left Plaintiff's home").

Plaintiff thereafter filed a motion under Federal Rule of Criminal Procedure 41(g) for the return of "vehicle titles and the money taken during the raid on Plaintiff's home as they were not contraband." Compl. ¶¶ 61, 83. Defendant Nelson opposed the request, but at some time on or before January 6, 2006, the vehicle titles and a check for \$17,000 were given to the plaintiff. Compl. ¶¶ 62-74, 85, 88. The amount of the check was \$2,000 less than the amount of cash reflected on the receipt that had been given at the conclusion of the search. Compl. ¶¶ 87-89.

Mr. Springer acknowledges that United States Magistrate Judge Frank McCarthy authorized and signed the search warrant. Compl. ¶ 78. He acknowledges that the \$19,000 was "taken pursuant to a Court Ordered Search Warrant." Compl. ¶ 97. He alleges that the \$2,000 discrepancy between the amount shown on the inventory form and the amount returned to him by check constitutes a "theft of property" (Compl. ¶ 90), and that he therefore has "suffered direct economic damage in the amount of \$2,000.00." Compl. ¶ 93. The alleged constitutional violation underlying his claim of \$2,000 in economic or compensatory damages was the agents' allegedly "deciding to help themselves to \$2,000.00 from the money they discovered during the levy of a search warrant." Compl. ¶ 92. He also alleges that, in opposing the plaintiff's Rule 41(g) motion (Compl. ¶ 61), defendants Nelson and Horn acted with a purpose to hide "the fact that \$2,000.00 had been stolen." Compl. ¶¶ 100-102.

In the plaintiff's "First Bivens Claim" (Compl. ¶¶ 91-95), he seeks judgment in the amount of \$2,000 for "direct economic damage." In the plaintiff's "Second Bivens Claim" (Compl. ¶¶ 96-105), he reiterates the alleged theft of \$2,000, and says that the opposition of

defendants Horn and Nelson to the plaintiff's motion for return of his property constituted an "effort to hide the fact that the \$2,000 had been stolen." Compl. ¶¶ 99, 101. Here, again, the plaintiff seeks judgment against defendants Horn and Nelson in the amount of \$2,000. Compl. ¶ 105. Finally, in the plaintiff's "Third Bivens Claim" (Compl. ¶¶ 106-113), he demands an award of \$1 million in punitive damages from each defendant for the alleged "theft and cover up." Compl. ¶ 110.

ARGUMENT

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR RELIEF UNDER THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION, AND THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER HIS SUIT

Plaintiff alleges that, after leaving with \$19,000 in cash, several IRS agents (including Special Agent Shern) stole \$2,000, leaving a \$17,000 balance. Because the approximately \$19,000 in currency had been discovered during the execution of a warrant authorized by United States Magistrate Judge McCarthy, the plaintiff attempts to frame the alleged conversion as a Fourth Amendment constitutional tort, actionable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and within this Court's federal-question jurisdiction. 28 U.S.C. §1331. For multiple reasons, the plaintiff has failed to state a constitutional tort claim on which relief may be granted, and the Court lacks subject-matter (federal-question) jurisdiction –

- A. As a matter of law, the acts alleged by the plaintiff will not support an inference of a Fourth Amendment violation; at most, he has alleged a common-law tort of conversion under Oklahoma law.
- B. A principal purpose for which the Supreme Court in *Bivens* authorized

damage actions against individual employees for Fourth Amendment violations is not present here, and this plaintiff has an adequate alternative remedy exclusive of an action against the individual employees.

- A. Plaintiff Springer has failed entirely to state a cause of action under the Fourth Amendment of the Constitution; in fact, his allegations are inconsistent with a claim of Fourth Amendment violation.

As relevant to this case, the Fourth Amendment regulated the procedure governing a search at Mr. Springer's residence. According to the inventory attached to the complaint (Ex. 1), the search ended at 2:40 p.m. on September 16, when – again according to the plaintiff – IRS agents departed his home with \$19,000 in currency.² That an alleged conversion of \$2,000 occurred thereafter (as the plaintiff alleges) is not a matter addressed by the Fourth Amendment.

An officer's conduct in executing a search warrant is subject to the Fourth Amendment “[f]rom the moment of entry until the moment of departure.” *Duncan v. Barnes*, 592 F.2d 1336, 1338 (5th Cir. 1979). *Accord, Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) (“conduct in executing a search warrant is subject to the Fourth Amendment from the moment of the officer's entry until the moment of departure”); *United States v. Dighera*, 2 F.Supp.2d 1377, 1381 (D. Kan. 1998) (“a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure”). Mr. Springer is unequivocal that the agents departed his residence with \$19,000. *If* a conversion thereafter occurred, the Fourth Amendment does not address that subsequent event.

Plaintiff, however, attempts to construe the Fourth Amendment as applying to the harm that he alleges, in an effort to create federal-question jurisdiction in this Court and to bring his

² The warrant encompassed currency. *See* note 1 *supra*.

suit within *Bivens*. But, not every act of a government employee is addressed by the Constitution. The post-search theft alleged by Mr. Springer is not governed by the Fourth Amendment, and he thus has failed to state a claim of a constitutional tort.

According to the plaintiff, *after* the execution of the search warrant had ended, and *after* the agents gave the plaintiff the “receipt” or “inventory” showing approximately \$19,000 (Complt. Ex. 1), the sum of “\$2,000.00 disappeared *between Plaintiff’s home and the depositing bank.*” Complt. ¶ 98 (emphasis added). “[O]nly \$17,000.00 of said seizure,” the plaintiff says, “actually survived from the search of Plaintiff’s home to the depositing bank.” Complt. ¶ 97. *See also* Complt. ¶89 (“\$19,000 when it left Plaintiff’s home”).³ But, as stated above, conduct is subject to the Fourth Amendment only “from the moment of entry until the *moment of departure.*” *Duncan v. Barnes*, 592 F.2d 1336, 1338 (5th Cir. 1979) (emphasis added); *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997).

United States Supreme Court and Tenth Circuit authorities reinforce the foregoing. In *County of Sacramento v. Lewis*, 523 U.S. 833, 843-45 (1998), the Court rejected an attempt to expand the Fourth Amendment’s reference to “seizures” to an *attempted* seizure: “a police pursuit in attempting to seize a person does not amount to a ‘seizure’ within the meaning of the Fourth Amendment.” *California v. Hodari*, 499 U.S. 621 (1991), is to the same effect: The common law made “many things unlawful,” the *Hodari* Court said, “very few of which were elevated to constitutional proscriptions.” 499 U.S. at 626 n.2.

In *Fox v. Oosterum*, 176 F.3d 342, 351-52 (6th Cir. 1999), the Sixth Circuit rejected an

³ That in the plaintiff’s view the *time* of the alleged conversion was *after* the agents left the home, and *after* the agents gave Mr. Springer an inventory receipt, is confirmed again in his allegations that he first learned of the alleged theft in January 2006. Complt. ¶¶ 87-89.

argument that the “refusal to return” property that had been lawfully seized raises a Fourth Amendment issue. The court would not “stretch *temporally* the Fourth Amendment to find a seizure.” Along the same line as that expressed by the Supreme Court in *Hodari*, the *Fox* court was unwilling to adopt –

a new, uncertain Fourth Amendment analysis that [would] allow litigants to jump straight to federal court every time a state official refuses to return property that was, at least at one point, lawfully seized or lawfully in the state’s possession.

And, see United States v. Jakobetz, 955 F.2d 786, 802 (2d Cir. 1992) (when police hold onto evidence longer than needed, there is no recourse under the Fourth Amendment).

In *Wagner v. Higgins*, 754 F.2d 186 (6th Cir. 1985), the appellate panel addressed an individual’s assertion of theft of personal property from an automobile that had been the subject of a post-arrest inventory search. The Sixth Circuit rejected the argument that the alleged theft violated the Fourth Amendment: “plaintiff Wagner’s complaint only makes out a case of an alleged unlawful conversion of his property . . . [or] custodial negligence.” 955 F.2d at 191.

Concurring Judge Contie agreed –

The claim that the continued retention by state actors of personal property, as opposed to its temporary seizure for use as evidence, violated the fourth amendment is, indeed, novel.

* * *

[T]he alleged theft of Wagner’s property did not work any fourth amendment wrong. . . .

955 F.2d at 194.

Nor does the balance of the complaint articulate a viable Fourth Amendment claim. Purported constitutional tort claims resting only on conclusory or generalized allegations must

be dismissed for failure to state a claim. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) --

The broad reading of [a pro se] plaintiff's complaint does not relieve the plaintiff of *the burden of alleging sufficient facts on which a recognized legal claim could be based*. . . [C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based. . . . [I]n analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations. [Emphasis added]

It is not, the Tenth Circuit said in *Hall*, “the proper function of the district court to assume the role of advocate for the pro se litigant.” *Id. Accord, Fogle v. Pierson*, 435 F.3d 1252, 1263 n.7 (10th Cir. 2006) (“Pro se status ‘does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based’”).

Where the allegation is a supposed violation of a *constitutional* right, the substantive law puts a heavy burden on the plaintiff. To proceed, a plaintiff must define a *clearly established* constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“clearly established constitutional right”). The right must be clearly established in a “*particularized* . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). *See, e.g., Baptiste v. J.C. Penny Co., Inc.*, 147 F.3d 1252, 1256 (10th Cir. 1998) (plaintiff must demonstrate “substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant’s actions were clearly prohibited”).

It is equally clear that no Fourth Amendment right is implicated in the opposition of Assistant United States Attorneys Horn and Nelson to Mr. Springer’s pre-indictment Rule 41(g) motion for return of property. Proceedings under Rule 41(g) may involve, but do not necessarily depend upon, an examination of the preceding search and seizure: One “aggrieved by . . . the

deprivation of property” may move for the return of the assets notwithstanding the lawfulness of the antecedent search and seizure. But, those Rule 41(g) proceedings – like this lawsuit – are judicial proceedings separate and apart from the search and seizure themselves. *If* there had been a Fourth Amendment violation on September 16, any such violation was an historical transaction that occurred before, and was entirely separate from, the Rule 41(g) proceeding. As noted above, the Fourth Amendment governs conduct only “[f]rom the moment of entry [at the search site] until the moment of departure.” *Duncan v. Barnes*, 592 F.2d 1336, 1338 (5th Cir. 1979).

A plaintiff may not dress in federal constitutional garb a claim that, at best, is a common-law tort simply to invoke this Court’s federal-question jurisdiction or to avoid resort to the alternative remedies available to him. This plaintiff, as a matter of law, has failed to state a Fourth Amendment claim on which relief can be granted, and thus has failed to state a basis on which to invoke this Court’s federal-question jurisdiction for an “action arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. In that posture, the case, we respectfully submit, should be dismissed.

- B. While there is lacking here an adequate claim of constitutional tort, and thus federal-question jurisdiction is lacking, the plaintiff is not without adequate alternative remedies for the loss that he alleges.

Even apart from the inapplicability of the Fourth Amendment to the harm of which Mr. Springer complains, Mr. Springer’s circumstances are not akin to those that in *Bivens* prompted the Court to imply a civil cause of action against individual agents. This is not, in the words of the *Bivens* Court, a case in which the interests protected by state laws and those protected by the Fourth Amendment “may be inconsistent or even hostile.” 403 U.S. at 394. To the contrary, Mr. Springer has adequate alternative legal remedies.

The Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 *et seq.*, provides that the United States shall be liable, to the same extent as a private party – *i.e.*, to the same extent that local law would make the employee liable – “for injury or loss. . . caused by the . . . wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. §§ 1346(b), 2674.⁴ Where the FTCA applies, it is “exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim.” 28 U.S.C. § 2679.

The FTCA is available to Mr. Springer, and it permits a remedy against the United States for the Oklahoma common-law tort that the plaintiff alleges, *i.e.*, that his property was wrongfully converted.⁵ *State law* defines, and *state law* and the FTCA protect, the property interest that the plaintiff claims was violated. Under Oklahoma law, “any act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with [the other’s] rights therein” is actionable as a “conversion.” *Lawmaster v. Ward*, 125 F.3d 1341, 1353 (10th Cir. 1997) (“dominion” implies “complete retention of control over disposition”), *citing* Oklahoma cases; *Installment Finance Corp. v. Hudiburg Chevrolet, Inc.*, 794 P.2d 751, 753 (Okla. 1990). *See also* Okla. St. Ann. § 95 (two-year limitations period for “an action for

⁴ The Justice Department can report that, in accordance with 28 U.S.C. § 2679(d), the United States Attorney, as the Attorney General’s authorized delegate, has determined and certified that defendants Horn, Nelson, and Shern were acting within the scope of their employment. Mr. Springer may rely on that determination in proceeding under the FTCA.

⁵ The United States is not a party to this action. Before suing the United States under the FTCA, an aggrieved party must first file an administrative claim with the relevant agency, here the IRS. 28 U.S.C. §§ 2672, 2675(a).

taking, detaining, or injuring personal property”).⁶

Thus, while the plaintiff has failed, as a matter of law, to state a Fourth Amendment damage claim against the individual employees, he nonetheless has adequate alternative remedies for the alleged conversion of \$2,000.⁷ Plaintiff has not shown – and cannot show – that he lacks an adequate alternative remedy to redress any deprivation of property of which he complains.⁸

ASSISTANT UNITED STATES ATTORNEYS HORN AND

⁶ “Conversion is any act of dominion wrongfully exercised over another’s personal property inconsistent with his rights therein. . . . [I]t is not necessary for the property to be wrongfully in the defendant’s possession or for the alleged converter to apply the property to his own use.” *Roberson v. PaineWebber*, 998 P.2d 193, 200 (Civ. App. Okla. 1999).

⁷ Compare *Hudson v. Palmer*, 468 U.S. 517, 520, 530 (1984), where the Supreme Court addressed the Fourteenth Amendment’s guarantee against the deprivation of property without due process – in a case where it was alleged that a prison officer had “*intentionally destroyed* certain of [plaintiff’s] noncontraband personal property” – and held that such “intentional deprivations do not violate [the Due Process Clause] *provided, of course, that adequate state post-deprivation remedies are available.*” 468 U.S. at 533 (emphasis added) *And, see Rodriguez-Mora v. Baker*, 792 F.2d 1524 (11th Cir. 1986) (action against a deputy United States Marshall for refusal to return property taken) --

If Baker [the deputy] was acting without authorization, the existence of a postdeprivation remedy under the FTCA will preclude the Fifth Amendment challenge.

792 F.2d at 1527.

⁸ While the defendants preserve the position that the Rule 41(g) mechanism also provides an adequate alternative remedy for a plaintiff in Mr. Springer’s position, we acknowledge that this Court is bound by the Tenth Circuit’s recent holding that a district court lacks authority in a Rule 41(g) proceeding to award money damages where “the government no longer possesses the property.” *Clymore v. United States*, 415 F.3d 1113, 1120 (10th Cir. 2005) (noting split in the circuits on this question).

NELSON ARE ABSOLUTELY IMMUNE FROM SUIT

Plaintiff's claims against Assistant United States Attorneys Horn and Nelson (Compl. ¶¶ 96-105) arise from those prosecutors' advocacy in this Court in response to Mr. Springer's motion for return of property under Rule of Criminal Procedure 41(g). Case No. 05-SM-1.

In addition to the same principles outlined above – namely, the failure to state a claim for relief under the Fourth Amendment; the separateness of the Rule 41(g) proceedings from the execution of the September 2005 search warrant; and the availability of alternative remedies – the two Assistant United States Attorneys against whom Mr. Springer attempts to assert a claim are entitled to *absolute* immunity that attaches to activities undertaken by a prosecutor in his or her role as an advocate in a judicial proceeding.

The common-law absolute immunity of a prosecutor in initiating a case and in presenting the government's case is based on the same considerations that underlie the common-law immunities of judges and grant jurors. *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976). These include, the Supreme Court has said –

concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Id.

Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending those decisions, often years after they were made, could impose unique and intolerable burdens. . . . The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system.

Imbler, 424 U.S. at 425-26. Subsequently, the Supreme Court reiterated the absolute immunity

in other contexts. In *Burns v. Reed*, 500 U.S. 478, 492 (1991), the Court noted the absolute immunity of prosecutors and lawyers at common law, and held that a prosecutor’s appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing (*see, e.g.*, Fed. R. Crim. P. 41(d)(2)(A)) were protected by absolute immunity –

This immunity extended to “*any hearing before a tribunal which perform[ed] a judicial function.*” In *Yaselli v. Goff*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395(1927), for example, this Court affirmed a decision by the Circuit Court of Appeals for the Second Circuit in which that court had held that the common-law immunity extended to a prosecutor’s conduct before a grand jury.

The prosecutor’s actions at issue here – appearing before a judge and presenting evidence in support of a motion for a search warrant – clearly involve the prosecutor’s “role as advocate for the State. . . .”

500 U.S. at 489-92 (emphasis added). In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Court focused on the prosecutor’s role as an advocate in judicial proceedings, and rejected an attempt to limit absolute immunity to the act of initiating prosecutions. The prosecutor is absolutely immune where he is acting “as an officer of the court” in the “role as advocate.” *Buckley*, 509 U.S. at 273.

The Tenth Circuit has reiterated the breadth of this absolute immunity, which “extends to state attorneys and agency officials who perform functions *analogous to those of a prosecutor* in initiating and pursuing civil and administrative proceedings.” *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991) (emphasis added). The relevant distinction is between “*actions in connection with the judicial process*, which are protected by prosecutorial immunity, and those that are primarily investigative or administrative in nature and hence are not.” 929 F.2d at 1490 (emphasis added). But, even then, the Tenth Circuit recognizes that “absolute

immunity may attach even to . . . administrative or investigative activities ‘when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court.’” *Id.* The “determinative factor is ‘advocacy’ because that is the prosecutor’s main function and the one most akin to his quasi-judicial role.” *Id.*⁹ See also *Guttman v. Khalsa*, ___ F.3d ___, 2006 WL 1017636 (10th Cir. April 19, 2006) (agency counsel in an administrative medical-license revocation hearing is absolutely immune from suit).

Clearly, at all relevant times the Assistant United States Attorneys were functioning as advocates, as officers of the court, and “in connection with the judicial process.” Defendants Horn and Nelson are absolutely immune from Mr. Springer’s damage claims.

CONCLUSION

The plaintiff has failed to state a claim, and the Court lacks subject-matter jurisdiction. The action should be dismissed, with the plaintiff permitted to pursue his alternative remedies.

If the Court denies the prosecutors’ motions to dismiss, we respectfully request that the case be stayed to the later of (i) the 60th day following entry of the order or (ii) resolution of any interlocutory appeal. The denial of immunity is appealable on an interlocutory basis to the extent that the denial turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir. 1992) (discovery stayed pending appeal). In any event, if any defendant’s motion to dismiss is denied, we respectfully request that the Court permit the defendant(s) a period of at least 30 days from the denial to answer the complaint.

Undersigned counsel for the defendants will also respond to such questions as the Court

⁹ The court found individual state attorneys absolutely immune to an allegation that they had “tried to force [the complainant] to give up his medical practice, first in return for keeping Board proceedings confidential and then by threatening to file sexual assault charges against him.” 929 F.2d at 1492.

may wish us to address.

Respectfully submitted,

David E. O'Meilia
United States Attorney

/s/ Gerald B. Leedom

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing was filed with the Clerk of the Court electronically today, **May 30, 2006**, such that a service copy was sent by way of the electronic filing system to the plaintiff and all counsel who have arranged for electronic service of filings, and it is further certified that an additional copy of the foregoing was mailed by First Class mail, postage-prepaid, to the plaintiff at the following address:

/s/ Gerald B. Leedom

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