

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

ROBERT L. VAZZO, LMFT, individually)	
and on behalf of his patients,)	
DAVID H. PICKUP, LMFT, individually)	
and on behalf of his patients, and)	Civil Action No. 8:17-cv-02896-CEH-AAS
SOLI DEO GLORIA INTERNATIONAL,)	
INC. d/b/a NEW HEARTS OUTREACH)	
TAMPA BAY, individually and on behalf of)	
its members, constituents and clients,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF TAMPA, FLORIDA, and)	
SAL RUGGIERO, in his official capacity as)	
Manager of the City of Tampa)	
Neighborhood Enhancement Division,)	
)	
Defendants.)	
)	

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO
DEFENDANT CITY OF TAMPA’S MOTION FOR PROTECTIVE ORDER
AND REQUEST FOR HEARING**

Plaintiffs, ROBERT L. VAZZO, LMFT, DAVID H. PICKUP, LMFT, individually and on behalf of their patients, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents, and clients, pursuant to Local Rule 3.01, files this response in opposition to Defendant City of Tampa’s Motion for Protective Order (Doc. 125), and request a hearing on the motion.

INTRODUCTION

“I’m not prejudging the issue of the 30(b)(6).”

(Hr’g Sept. 13, 2018, Doc. 125-1, at 40:12–13.)

Defendant City of Tampa (the “City” or “Tampa”) reads the Court’s guidance from the September 13, 2018 discovery hearing (Doc. 120) too restrictively. The hearing concerned

Plaintiffs' written discovery requests, and the Court expressly avoided imposing any limitations on Plaintiffs' anticipated Rule 30(b)(6) deposition notice to the City:

THE COURT: I'm not prejudging the issue of the 30(b)(6). . . .

. . . .

MR. MIHET:So we're okay with the documents being cut off, but we don't believe that questioning of a witness should be cut off at December 15th. I hope that makes sense.

THE COURT: I understand your position. And **if that becomes an issue** that you all are fighting over, **you can bring that to my attention**. I will just point out that **right now** you're getting six months of enforcement. . . .

Now, if that enforcement changed after the filing of the complaint, I mean, perhaps you could ask that type of a general question. . . .

(Hr'g Sept. 13, 2018, Doc. 125-1, at 40:8–13, 42:14–43:24.)

Now, "that" has become an issue, among others. But the parties bring the issue to the Court's attention without prejudice on the outcome, as much as Tampa would prefer the contrary. For the reasons that follow, Plaintiffs are entitled to question the City's Rule 30(b)(6) representative(s) in accordance with Plaintiffs' Notice of Taking Depositions of Defendants (Doc. 125-2). The City's objections should be overruled, and its motion denied.

ARGUMENT

I. PLAINTIFFS' RULE 30(b)(6) DEPOSITION NOTICE IS TIMELY AND APPROPRIATE.

The City's argument that Plaintiffs' deposition notice is premature and somehow violative of Rule 26 can be dispatched quickly. (City Mot. Prot. Ord., Doc. 125, at 5–6.) As the Court will recall, Plaintiffs served their written discovery requests on Defendants on August 9, 2018. (Doc. 111 at 2; Doc. 111-4 at PageID 1737.) Plaintiffs did not serve a Rule 30(b)(6) deposition notice on

the City with their written discovery requests. Rather, Plaintiffs generally outlined for Defendants the anticipated Rule 30(b)(6) topics to allow Defendants to identify and check the availability of the City's potential designee(s). (Doc. 111-4 at PageID 1737–38 (“We will identify the Rule 30(b)(6) topics more fully in a forthcoming formal deposition notice”)) Disputes arose as to the parameters of Tampa's search for electronically stored information (ESI) responsive to Plaintiffs' discovery requests, and Plaintiffs' counsel conferred with Defendants' counsel in an attempt to narrow the parameters and otherwise resolve the disputes. (Doc. 111 at 4–5; Doc. 111-4 at PageID 1733–38.) During the course of those conferences, Defendants' counsel raised no concerns about the timing or scope of the proposed Rule 30(b)(6) deposition. Rather, Defendants' counsel abruptly stopped working with Plaintiffs' counsel to resolve **any** discovery matters, and instead sought to delay all discovery until after the preliminary injunction hearing. (Doc. 106; Doc. 111 at 2–5; Doc. 111-4 at PageID 1733–34.)

Following the Court's September 13 Order (Doc. 121) allowing Plaintiffs' written preliminary injunction discovery to go forward, which moved the hearing date to provide time for document review and **“any other discovery necessary prior to the preliminary injunction hearing”** (emphasis added), Plaintiffs noticed Defendants' depositions. (Pls.' Not. Taking Depos. Defs., Sept. 18, 2018, Doc. 125-2.) Plaintiffs noticed the depositions to occur a reasonable time before the hearing, and designated relevant topics for the City's representative based on information available to Plaintiffs at the time. Plaintiffs' approach violated no rules, and was the most prudent and reasonable under the circumstances. *See* Fed. R. Civ. P. 26(d)(3)(A) (“Unless the parties stipulate or the court orders otherwise . . . methods of discovery may be used in any sequence.”). The cases cited by the City do not hold otherwise.

The Court has already invested substantial judicial resources in resolving the scope of preliminary injunction discovery and facilitating its completion before the hearing. (Docs. 119, 121.) Given the necessarily compressed timeframe for completing that discovery, Plaintiffs do not have the luxury of spacing out written and deposition discovery as if working under a full pretrial discovery schedule. Also of concern is the efficiency of the preliminary injunction hearing itself. Plaintiffs believe that conducting the preliminary injunction hearing on a record that includes Defendants' discovery responses and deposition testimony will very likely obviate the need for live witness testimony, and will limit the hearing to argument on the record, thus making it much more efficient for the Court and the parties. It defies reason to expect Plaintiffs to wait until the one-day hearing to attempt to authenticate or question Defendants' witnesses on documents produced in discovery, which so far number almost 10,000 pages. On the contrary, the Rule 30(b)(6) deposition is vital to narrowing the issues for the hearing and ensuring, to the greatest extent possible, the efficiency of the hearing. The Court seemed to agree at the September 13 hearing: "[I]n light of what's being provided and what has been requested, it seems to me that perhaps **a 30(b)(6) deposition would benefit both sides in terms of providing clarity, as opposed to Mr. Mihet just trying to offer a bunch of documents into evidence in the course of a hearing.**" (Hr'g Sept. 13, 2018, Doc. 125-1, at 41:21–42:3 (emphasis added).) Plaintiffs' Rule 30(b)(6) notice is timely, appropriate, and necessary.

II. THE CITY'S REPEATED SCOPE OBJECTION BASED ON THE COURT'S LIMITS ON WRITTEN DISCOVERY SHOULD BE OVERRULED BECAUSE THE WRITTEN DISCOVERY LIMITS ARE INAPPLICABLE TO THE CITY'S RULE 30(b)(6) OBLIGATIONS.

For each of the five deposition topics the City specifically objects to—7, 9, 10, 11, 12—the City objects on the grounds of the Court's September 13, 2018 Order (Doc. 121) limiting the scope of Plaintiffs' **written discovery requests**. (City Mot. Prot. Ord., Doc. 125, at 6–7 (Topic 7),

10–11 (Topic 3), 12 (Topic 10), 14–15 (Topic 11), 18 (Topic 12).) This repetitive objection should be overruled because the Court’s written discovery limitations have no bearing on the City’s Rule 30(b)(6) obligations.

Under Rule 30(b)(6), the City “must designate one or more officers, directors, or managing agents, or . . . other persons who consent to testify on its behalf . . . who must testify about information **known or reasonably available to the [City].**” (Emphasis added.) “This affirmative duty extends only to information ‘known or reasonably available to the organization.’ Determining if certain information is ‘known or reasonably available’ to an entity requires a fact-specific analysis.” *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391, 393–94 (D.N.J. 2011). What information is “reasonably available” to the City for purposes of designating one or more witnesses must be determined in the first instance by the City; it is not determined by the Court’s Order limiting search terms and custodians for Plaintiffs’ written discovery requests. Assuming for the sake of argument that the 20 custodians designated by the Court include the best (or most reasonable) witnesses for the 30(b)(6) topics, the City should designate one or more of them to testify. But it is disingenuous for the City to suggest that the “reasonably available” standard might require it to interview all 4,000 City employees to prepare for the deposition. The City’s repeated scope objection should be overruled, and the City required to comply with the Rule 30(b)(6) “reasonably available” standard.

III. THE CITY’S REMAINING SPECIFIC OBJECTIONS ARE UNFOUNDED AND SHOULD BE OVERRULED.

A. First Principles for Reviewing the City’s Remaining Specific Objections.

Turning to Defendants’ remaining specific objections, some first principles must be kept in view: “The Federal Rules of Civil Procedure strongly favor full discovery whenever possible.” *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir.1985). And, “[t]he

overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result.” *Oliver v. City of Orlando*, No. 606CV-1671-ORL-31DAB, 2007 WL 3232227, at *1 (M.D. Fla. Oct. 31, 2007).

Regarding relevance, “[i]t is well-settled that the definition of relevance sets a remarkably low bar” *Pinilla v. Northwings Accessories Corp.*, No. 07-21564-CIV, 2007 WL 2826608, at *4 (S.D. Fla. Sept. 25, 2007); *Berencen v. Charter Oak Fire Ins. Co.*, No. 07-21328 CIV, 2007 WL 2460765, at *3 (S.D. Fla. Aug. 24, 2007) (“[T]he bar to establishing relevance is exceedingly low”). “Evidence is relevant if [] it has **any tendency** to make a fact more or less probable than it would be without the evidence [and] the fact is of consequence in determining the action.” Fed. R. Evid. 401 (emphasis added). The information sought by Plaintiffs is relevant to their constitutional and preemption claims against the City’s Ordinance, and the City’s repeated relevance objections are unpersuasive given the low relevancy bar.

Finally, Defendants’ repeated proportionality objections provide either implausible or insufficient information to displace Plaintiffs’ need for, and right to, the relevant discovery. “The application of proportionality should be based on information rather than speculation.” *Digital Assurance Certification, LLC v. Pendolino*, No. 6:17-CV-72-ORL-41TBS, 2017 WL 4342316, at *9 (M.D. Fla. Sept. 29, 2017).

B. The Remaining Specific Objections Should be Overruled.

1. Topic 7.

The City’s relevance objection to Topic 7 should be overruled. The City’s communications and coordination with Equality Florida concerning the Ordinance are obviously relevant because, as this Court has already found, Equality Florida was “‘instrumental’ to” and ‘actively involved in

the enactment of the Ordinance.” (Doc. 52 at 10.) Given that this Court also has already determined that the Ordinance’s legislative history is relevant to the constitutional analysis that will be front and center in considering Plaintiffs’ preliminary injunction motion (Order, Doc. 51, at 5–6), it is difficult to imagine more relevant subject matter. Communications and coordination with any other advocacy groups in connection with the Ordinance, which are also covered by Topic 7, are likewise highly relevant.

The City’s proportionality objection to Topic 7 should be overruled because it is based on the implausible proposition that it is required to talk to its 4,000 employees to find discoverable information. Given the high relevance of the information sought, and the “reasonably available” standard of Rule 30(b)(6), the City must show much more to sustain a proportionality objection.

The City’s asserted common interest with Equality Florida is also insufficient to avoid examination on Topic 7. First, the privilege claim itself is dubious. In order for the common interest to apply, the parties must have an identical legal interest. *See In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2017 WL 9807442, at *3 (N.D. Ala. Aug. 31, 2017). This Court, in denying intervenor status to Equality Florida, found only that “Equality Florida has a defense that shares a common question of law or fact with the City,” and made that finding under the “liberal construction” required of the permissive intervention rules. (Doc. 52 at 8, 10.) This finding is far short of the identical legal interest required for common interest status. To be sure, the Court observed that Equality Florida’s legal interests are not aligned with the City’s: “Equality Florida has no enforcement role in upholding Ordinance 2017-47. Additionally, if the plaintiffs succeed in their claim for damages, the City would be liable to pay those damages—not Equality Florida.” (Doc. 52 at 9.)

Second, even if the City could show a sufficient common interest, the City claims the privilege only with respect to communications after the commencement of this case. (City Mot. Prot. Ord., Doc. 125, at 8–9.) And the City’s privilege log lists only one document as privileged based on the City’s purported common interest with Equality Florida. This leaves open for inquiry, even if the privilege could apply, all communications and coordination with Equality Florida during its “instrumental” efforts to pass the Ordinance. In any event, the City may assert the privilege in response to specific questions at the deposition, which will entitle Plaintiffs to question the witness on the facts underlying the privilege claim. *See Middle District Discovery* (2015) at 20–22.

2. Topic 9.

Plaintiffs’ relevance and proportionality objections to Topic 9 should be overruled. The City’s drafting, consideration, debate, and enactment of the Ordinance all implicate the legislative history of the Ordinance already found to be relevant by this Court, and the City makes no plausible proportionality argument.

The City’s interpretation, application, and enforcement of the Ordinance are likewise highly relevant. It is well settled that a government’s Rule 30(b)(6) representative may be questioned on the government’s interpretation, application, and enforcement of its own laws. *See, e.g., Hoyer v. City of Oakland*, 653 F.3d 835, 849–851 (9th Cir. 2011) (recognizing propriety and importance of Rule 30(b)(6) witness’s testimony on city’s “policies, procedures, and **interpretations relating to enforcement**’ of the Ordinance” at issue (emphasis added)); *id.* at 850 n.12 (“[A]ll of the questions were asked in an attempt to ascertain the City’s **enforcement** policy. In a sense, questions about a general policy are, by their very nature, always hypothetical: a policy provides what officers should do under certain hypothetical circumstances. We would be setting an impossibly high bar for plaintiffs if we were to require them to establish a municipality’s policy

and then to exclude as inadmissible a responsible police official's testimony as to what the municipality's policy is.” (emphasis added)); *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 31–37 (2d Cir. 2015) (describing deposition of city 30(b)(6) witness regarding “drafting, passage, and **enforcement**” of challenged ordinance, “potential **application and interpretation**” of challenged ordinance, and “**legal interpretations** offered by its designated witness,” and explaining remedies available to both sides for any abuses of the process (emphasis added)); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 411 (N.D. Ala. 2017) (denying motion for protective order to state official and requiring him to submit to 30(b)(6) deposition “regarding proper **interpretation**” of challenged law (emphasis added)); *Billups v. City of Charleston*, No. 2:16-cv-00264-DCN, 2017 WL 4238233, *4 (D.S.C. Sept. 25, 2017) (describing questioning of city 30(b)(6) witnesses on city’s **interpretation and application** of challenged ordinance in hypothetical contexts).

In light of this Court’s prior relevance determination and the authorities cited above, the City’s relevance and proportionality objections to Topic 9 must be overruled.

3. Topic 10.

The City’s proportionality objection to Topic 10 should be overruled. Materials the City requested the Court to take judicial notice of are obviously considered relevant by the City, and this high relevance requires a specific and plausible proportionality objection to block the discovery. Providing a witness or witnesses who can testify to what the materials are and their relation to the Ordinance is neither disproportionate to the needs of this case nor unduly burdensome for the City, especially if the materials are as obviously relevant as the City claims.

4. Topic 11.

The City’s relevance, proportionality, and work product objections to Topic 11 should be overruled. “[L]itigants in lawsuits in this district *routinely* seek Rule 30(b)(6) testimony about the

existence and timing of litigation holds and the steps taken to locate responsive documents and electronically stored information.” *King v. Akima Global Servs., LLC*, 323 F.R.D. 403, 408 (S.D. Fla. 2017) (emphasis in original); *see also In re Furstenberg Fin. SAS*, No. 16-cv-60266-BLOOM, 2017 WL 6560357, at *10 (S.D. Fla. Oct. 31, 2017) (granting, in case where search terms not agreed upon before production, motion to compel corporate 30(b)(6) witness to testify regarding corporation’s “search methodology and the integrity of [corporation’s] search and production efforts,” including search terms used, process for gathering documents, scope of search for documents, custodians identified as having potentially responsive information, dates used for search, process for determining responsiveness); *Bldg. Materials Corp. of Am. v. Henkel Corp.*, No. 6:15-cv-548-Orl-22GJK, 2016 WL 11164043, at *1–2 (M.D. Fla. Apr. 29, 2016) (overruling objection to 30(b)(6) deposition regarding document gathering and production efforts on attorney-client and work product grounds, denying protective order on same grounds, compelling production of 30(b)(6) witness on efforts to locate and produce documents, and advising objecting party “is free to assert privilege as to specific questions at the deposition, if appropriate under the Federal Rules . . .”).

5. Topic 12.

The City’s relevance and proportionality objections to Topic 12 should be overruled. The information sought is relevant first to Plaintiffs’ constitutional claims against the Ordinance, which require a narrow tailoring analysis. The absence or presence of other ordinances regulating mental health or other professionals is relevant to Defendants’ respective capacities and competence to enforce such ordinances, which in turn is relevant to the question whether the ordinances are narrowly tailored to The City’s asserted “compelling interest in protecting the physical and psychological well-being of minors” (Ordinance, Doc. 1, at PageID 44.) In other words, Defendants’ inability to enforce their ordinances because they have neither the experience,

knowledge, nor appropriately credentialed personnel to police counseling offices is relevant to whether the ordinances are narrowly tailored (or even rationally related) to the City's claimed compelling interests.

The information sought is relevant also to Plaintiffs claim that the Ordinance is void *ab initio* because impliedly preempted by state law, and otherwise in conflict with state law. "Preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (internal quotation marks omitted). The absence of **any** regulation of mental health professions and professionals by the City, especially when viewed in light of the City's purported compelling interests, is relevant evidence that the City heretofore has submitted to the state's "will to be the sole regulator" of mental health and similarly situated professionals. *See Lake Hamilton Lakeshore Owners Ass'n, Inc. v. Neidlinger*, 182 So. 3d 738, 743 (Fla. 2d DCA 2015) (internal quotation marks omitted).

The absence of **any** regulation of mental health professionals by the City is also relevant to the existence of a strong public policy favoring exclusive state regulation of the field, which is the second part of the implied preemption analysis. Moreover, public policy would oppose any attempt to regulate mental health professionals by unqualified municipal employees. A principal contention of Plaintiffs in this lawsuit is that dog catchers and other code enforcement officials are neither trained nor trainable to police talk therapy in counseling offices, unless such officials hold professional degrees equivalent to those of the health professionals they are charged with regulating. Thus, whether Defendants have undertaken to enforce any regulations against mental

health or other professionals is critically relevant to Plaintiffs' claims and the implied preemption public policy analysis.

Moreover, Defendants have not plausibly explained what actual burden would be involved in their providing the information. "The application of proportionality should be based on information rather than speculation." *Digital Assurance Certification, LLC*, 2017 WL 4342316, at *9. Plaintiffs' review of the City's ordinance code reveals it does not purport to regulate health or other professionals apart from the counseling bans in suit. But Plaintiffs' review of the ordinance code cannot answer the question whether Defendants enforce any ordinances against mental health or other professionals, and how? Plaintiffs are entitled to the City's answers, so as to narrow the disputed issues and potential for surprise in the preliminary injunction proceedings.

Furthermore, if the answer is "no" or "none," then it is difficult to conceive of a less burdensome task for the City than preparing a 30(b)(6) witness to say so. How many code enforcement departments tasked with regulating mental health or other professionals can the City possibly have? One? Maybe two? Certainly not more than three. Defendants' designating and preparing one or more witnesses from this necessarily limited universe of department heads is not overly burdensome.

6. The City's Boilerplate Add-On Objections to Each Specific Topic Should be Overruled.

Most of the City's "specific" objections include unspecific objections generally asserting annoyance, oppression, and undue burden and expense. All of these add-on, boilerplate objections should be overruled.

CONCLUSION

For all of the foregoing reasons, the City's objections should be overruled, and its motion for protective order denied. Furthermore, Plaintiffs request a hearing because Plaintiffs believe a hearing will assist the Court in determining the important matters at issue in the City's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this October 11, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam
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