

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, *et al.*,
Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, *et al.*,
Defendants.

**STATE OFFICIALS' COMBINED REPLY IN SUPPORT OF MOTION TO STAY ALL
DISCLOSURES AND DISCOVERY AND MOTION FOR ORDER PROHIBITING
PLAINTIFFS' USE OF OPEN RECORDS LAWS TO CIRCUMVENT DISCOVERY**

Defendants Aubrey Elenis, Director of the Colorado Civil Rights Division, in her official and individual capacities (the “Division Director”), Anthony Aragon, Miguel “Michael” Rene Elias, Carol Fabrizio, Charles Garcia, Rita Lewis, Jessica Pocock, and Ajay Menon, in their official capacities as members of the Colorado Civil Rights Commission (collectively, “Commissioners” or the “Commission”), Cynthia H. Coffman, in her official capacity as Colorado Attorney General (the “Attorney General”), and John Hickenlooper, in his official capacity as Colorado Governor (the “Governor”) (collectively, “State Officials”), submit this combined Reply in support of their Motion to Stay All Disclosures and Discovery (“Stay Motion”) and Motion for Order Prohibiting Plaintiffs’ Use of Open Records Laws to Circumvent Discovery (“CORA Motion”).

INTRODUCTION

The Stay and CORA Motions share the same, straightforward legal underpinning. By filing their Verified Complaint [Doc. 1] on August 14, 2018, Plaintiffs invoked this Court’s jurisdiction and, in the process, voluntarily submitted to its Orders, including specifically those

that control the exchange of records and information between the parties. To be sure, the State Officials are actively challenging this Court’s jurisdiction to consider any of Plaintiffs’ claims. *See* Doc. 64 (Rule 12(b)(1) Motion to Dismiss the First Amended Verified Complaint). But in the meantime, they were compelled to file the instant Motions to apprise this Court of their concerns about whether discovery should commence while the Motion to Dismiss is pending, and whether Plaintiffs should be allowed to use extra-judicial means of obtaining records from them while this case is pending. Contrary to the assertion that they are “desperately seeking a veil of darkness,” Doc. 65, p. 1, the State Officials are simply asking this Court to do what the Federal Rules of Civil Procedure (the “Rules”), its inherent authority, and the myriad cases in their favor authorize it to do. Namely, control these proceedings “to secure [their] just, speedy, and inexpensive determination[.]” Fed. R. Civ. P. 1.

ARGUMENT

I. Discovery and disclosures must be stayed pending the outcome of the Motion to Dismiss.

A. Plaintiffs fail to identify any apposite legal authority that overcomes the cases cited in the Stay Motion.

At the Rule 16(b) Scheduling Conference held on October 24, 2018, this Court vacated the conference and deferred entry of the parties’ proposed joint Scheduling Order [Doc. 45]. *See* Doc. 56. Instead, it ordered the parties to engage in expedited briefing on the instant Motions, and specifically directed Plaintiffs’ Response to address the cases cited in the Stay Motion holding that a stay is warranted where, as here, a dispositive motion has been filed that challenges the court’s jurisdiction and, importantly, raises various absolute and qualified immunities from suit. *See* Doc. 48, pp. 5-6, 8. But the Response ignored this Court’s direction. It did not even discuss—much less attempt to distinguish this case from—any of the on-point cases cited in the Stay Motion. *See* Doc. 65, pp. 5-14. Instead, it countered with cases that share

absolutely *no* factual, legal, or procedural commonalities with this case, and that were cited for only their *general* propositions regarding stay motions. *See id* at p. 5 (citing *Morrill v. Stefani*, No. 17-cv-00123-WJM-KMT, 2017 WL 1134767, at *1 (D. Colo. Mar. 13, 2017); *Arch Specialty Ins. Co. v. 13 Pure, Inc.*, No. 11-cv-00461-PAB-MEH, 2011 WL 4485969, at *1 (D. Colo. Sept. 27, 2011); *Chavez v. Young America Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007).

Morrill, for example, concerned a purely private party dispute alleging copyright infringement of a sound recording and musical composition in which the defendants filed a motion to dismiss under Rule 12(b)(2), (3), and (6). 2017 WL 1134767, at *1. Unlike this case, it did not involve government official defendants, an ongoing state administrative enforcement action, or any Rule 12(b)(1) defenses. *Id.* And even though Plaintiffs cite *Morrill* for the general proposition that discovery should rarely be stayed, the requested stay was, in fact, granted in that case. *Id.* at *2. *Arch Specialty* is similarly inapposite. That case involved a diversity action seeking declaratory relief about the limits of an insurance policy between purely private parties, in which the defendants filed a motion to dismiss under Rule 19 for failure to join a party. 2011 WL 4485969, at *1. As with *Morrill*, *Arch Specialty* also did not involve any state actor defendants, or any Rule 12(b)(1) defenses. *Id.* And *Chavez* is likewise off-point because it involved a class action by private party insureds over insurance coverage that the defendant, a private party insurer, moved to dismiss under Rule 12(b)(6) for failure to state a claim. 2007 WL 683973, at *1. Like *Morrill* and *Arch Specialty*, *Chavez* has nothing in common with this case.

As a result, this Court must disregard *Morrill*, *Arch Specialty*, and *Chavez* because they carry no weight when put up against the on-point cases cited in the Stay Motion as support for why each of the stay factors weighs in favor of the State Officials here.

B. Plaintiffs' reliance on *Sica v. Connecticut* is likewise misplaced and must be rejected by this Court.

Although *Sica v. Connecticut*, 331 F. Supp. 2d 82 (D. Conn. 2004), has some factual and legal commonalities with this case, Plaintiffs' reliance on it to overcome the Stay Motion is still misplaced for two reasons. *First*, it is procedurally inapposite to the posture of this case. In *Sica* the physician plaintiff sought to preliminarily enjoin the Connecticut Medical Examining Board (the "Board") from proceeding with disciplinary and license revocation proceedings and, in connection with that motion, requested an evidentiary hearing and affirmatively filed a motion to conduct expedited discovery in advance of the scheduled hearing. 331 F. Supp. 2d at 83. Thus, while the Board moved to dismiss on *Younger* abstention grounds like the State Officials here, it did *not* seek a stay of discovery like the State Officials here. As a result, the sole issue before the district court in *Sica* was whether the physician plaintiff was entitled to engage in some discovery on an expedited basis for the *limited* purpose of trying to prove the bad faith exception to *Younger* abstention at the evidentiary hearing on her preliminary injunction motion. 331 F. Supp. 2d at 87. As a result, *Sica* contains *no* discussion of the stay factors and therefore cannot overcome the cases cited in the Stay Motion as support for why a *general* stay of all disclosures and discovery is warranted in this case.

Second, the disparate procedural posture reveals the true purpose of Plaintiffs' reliance on *Sica*. Namely, to effectively embed an affirmative motion for limited, expedited discovery on this issue of bad faith as it relates to the State Officials' *Younger* abstention defense in their Response to the Stay Motion. Doc. 65, p. 6 ("Rather than stopping all discovery, the Court should allow Phillips to conduct limited discovery to support his claims that some *Younger* exceptions apply."). This they cannot do. *See* D.C.Colo.LCivR 7.1(d) ("A motion shall not be included in a response or reply to the original motion. A motion shall be filed as a separate

document.”). Instead, Plaintiffs must file their own Rule 26(d) for expedited discovery on the limited issue of bad faith as it relates to *Younger* abstention, and then carry their uphill burden to prevail on such a motion given that: (1) unlike the plaintiff in *Sica*, their Motion for Preliminary Injunction did not request an evidentiary hearing, *see* Doc. 57; (2) both their original complaint [Doc. 1] and amended complaint [Doc. 51] contained allegations of bad faith on the part of the State Officials that were verified by Mr. Phillips under penalty of perjury; and (3) Plaintiffs conceded in the parties’ proposed joint Scheduling Order that “this case primarily involves disputed questions of law,” *see* Doc. 45, ¶ 6(h). Indeed, the district court in *Sica* discussed the many concerns attendant with granting such a motion. 331 F. Supp. 2d at 87-88. Accordingly, the State Officials must be afforded an opportunity to fully respond to such a discrete motion seeking specific relief. By raising an unspecified request in their Response to the Stay Motion, Plaintiffs ask improperly ask this Court to deprive the State Officials of that opportunity.

II. Orders of this Court may properly limit Plaintiffs’ use of open records laws to supplant discovery.

Plaintiffs do have a state statutory right to access public records under the Colorado Open Records Act (“CORA”), but CORA itself imposes specific limitations on that right. Specifically, it provides that:

(1)(a) All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law....

...

(1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:

...

(c) *Such inspection is prohibited* by rules promulgated by the supreme court or *by the order of any court.*

C.R.S. §§ 24-72-203(1)(a) and 24-72-204(1)(c) (emphasis added). The plain language of CORA establishes that the right to access public records can be limited by other laws or the order of any

court, including this Court. *Id.*; see *Neiberger v. Hawkins*, 70 F.Supp.2d 1177, 1184 (D. Colo. 1999) (“In construing statutory provisions, a court should give effect to the intent of the legislature. A court must look first to the statutory language itself, giving words and phrases their commonly accepted meaning. Where the language of a statute is plain and the meaning is clear, a court need not resort to interpretive rules of statutory construction, but must apply the statute as written.”). The provision of CORA that allows access to public records to be limited by the order of any court should be applied as expansively as written. *Neiberger*, 70 F.Supp.2d at 1184.

An en banc decision of the Colorado Supreme Court also supports the State Officials’ contention that CORA allows access to public records to be limited by the order of any court. In *Martinelli v. District Court in and for City and Cnty of Denver*, 612 P.2d 1083, 1093 (Colo. 1980), the court considered whether Denver could refuse to produce certain public records during discovery in a civil state court case because CORA specifically exempted the records from public access. See also C.R.S. §§ 24-72-204(3)(a)(II) and 24-72-305(5) (1973). Denver argued that CORA exemptions essentially “constitute privileges from civil discovery within the meaning of C.R.C.P. 26(b)(1).” *Id.* In considering Denver’s argument, the Colorado Supreme Court noted that:

The open records laws regulate, as a general matter, the inspection and copying of governmental records by “any person,” without limitation as to the reason or reasons for which the inspection is undertaken. However, the legislature was careful to limit key provisions of the open records laws, making those provisions applicable except as “otherwise provided by law” or except as “prohibited by rules promulgated by the supreme court or by the order of any court.”

Martinelli, 612 P.2d at 1093 (citations omitted). The court construed the quoted limiting language in CORA as an “indicat[ion] that the legislature did not intend that the open records laws would supplant discovery practice in civil litigation,” because such laws “are ‘directed toward regulation of an entirely different situation of the general exploration of public records by

any citizen during general business hours.” *Id.* (quoting *Tighe v. City and County of Honolulu*, 520 P.2d 1345, 1348 (Haw. 1974)). Based on this reasoning, the Colorado Supreme Court held that CORA exemptions for specific public records “do not, ipso facto, exempt the [records] from discovery in civil litigation.” *Id.*, at 1094. As relief, the court in *Martinelli* ordered the trial court to conduct an in camera examination of the records, “make appropriate findings, and order discovery of materials contained in the [records], subject to appropriate protective orders, consistent with the views expressed in this opinion.” *Id.* (emphasis added).

The *Martinelli* decision therefore squarely supports the State Officials’ contention that the order of any court controls a party’s access to public records in civil litigation regardless of whether CORA allows or prohibits access to the same records. If CORA allows access and the order of any court prohibits discovery, the court order trumps CORA. If CORA prohibits access and the order of any court permits discovery, the court order trumps CORA.

Decisions of other federal district courts are consistent with the Colorado Supreme Court’s decision in *Martinelli*. For example, in *Morrison v. City and Cnty of Denver*, 80 F.R.D. 289, 290-91 (D. Colo. 1978), the city defendants argued that certain public records sought by plaintiffs in discovery should only be produced subject to a protective order because CORA specifically exempted public access to the same. In reviewing the magistrate’s order granting the city’s request for a protective order, the district court stated: “The Colorado Public Records Act itself authorizes inspection and affords no basis for defendants’ motion. The Act was never intended to thwart discovery in litigation.” *Morrison*, 80 F.R.D. at 291. In declining to affirm the magistrate’s order based on the city defendants’ CORA argument, the district court construed the express language of CORA that requires public records to be open for inspection except “as otherwise provided by law” as follows:

The [Federal] Rules of Civil Procedure are laws which provide for the inspection and discovery of any matter, not privileged, which is relevant to any claim or defense even if such information would be inadmissible at trial so long as it appears reasonably calculated to lead to the discovery of admissible evidence. Since the statute expressly includes inspection as provided by law, I need give it no other construction which would place it in controversy with the [Federal] Rules of Civil Procedure. Thus, I am not required to address the issue of whether such a state statute could abridge the federal judicial process by prohibiting or limiting discovery. The statute and rules are not in conflict, they are in harmony.

Id.; see accord *Lumpkin v. Clark*, 2009 WL 960694, *2 (D. Colo. 2009) (granting motion to compel government defendant to produce records specifically exempted from public access under CORA) (citing *Martinelli* and *Morrison* with approval); *Berniger v. Denver and Rio Grande Western Railroad Co.*, 139 F.R.D. 175, 176-77 (D. Colo. 1991) (rejecting a third-party government entity's argument that it could refuse to produce certain public records in response to a subpoena duces tecum because CORA specifically exempted the records from public access) (citing *Martinelli* and *Morrison* with approval).

The Response cites to *People in Interest of A.A.T.*, 759 P.2d 853 (Colo. App. 1988), as support for Plaintiffs' contention that "[t]he fact that a CORA requester might be engaged in litigation with a public entity creates no exception to the inspection and copying rights established by the statute." Doc. 65, p. 14. The *A.A.T.* decision is not inconsistent with the State Officials' reading of *Martinelli*, *Morrison*, and the other federal district court cases cited in this Reply. The court of appeal's *A.A.T.* decision held only that the trial court in a parental rights termination case lacked jurisdiction to consider an objection to a CORA request. In dicta, the court stated that CORA "does not expressly limit access to any records merely because a person is engaged in litigation with the public agency from which access to the records is requested." 759 P.2d at 854. The court's statement was accurate. A person who is engaged in litigation with a government entity may use CORA to request records that are unrelated to the litigation.

However, CORA does not authorize the same person to use CORA to supplant or to supplement discovery of any information or documents that are related to the litigation.

CONCLUSION

Accordingly, the State Officials respectfully request that this Court grant both their Stay Motion and CORA Motion.

DATED: November 14, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I served a true and complete copy of the foregoing **STATE OFFICIALS' COMBINED REPLY IN SUPPORT OF MOTION TO STAY ALL DISCLOSURES AND DISCOVERY AND MOTION FOR ORDER PROHIBITING PLAINTIFFS' USE OF OPEN RECORDS LAWS TO CIRCUMVENT DISCOVERY** upon all counsel of record and parties who have appeared in this matter through ECF or as otherwise indicated below:

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