

**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; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
MIGUEL “MICHAEL” RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities; and
PHIL WEISER, Colorado Attorney General, in his official capacity,

Defendants.

**PLAINTIFFS’ MOTION TO EXPEDITE THEIR FED. R. CIV. P. 72(a) OBJECTION
TO MAGISTRATE JUDGE’S ORDER FORBIDDING DEPOSITIONS OF
DEFENDANT COMMISSIONERS AND TO STAY EXPEDITED DISCOVERY**

INTRODUCTION

This Court has already said that Defendants’ (collectively, Colorado) ongoing “disparate treatment” of Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) reveals Defendant Colorado Civil Rights Commissioners’ “hostility towards Phillips, which is sufficient to establish they are pursuing the discrimination charges against Phillips in bad faith, motivated by Phillips’ suspect class (his religion).” Doc. 94 at 20-21. Now the parties are moving through expedited discovery toward an evidentiary hearing on Phillips’s amended motion for preliminary injunction. That hearing will address whether the Commissioners are acting with hostility toward Phillips and his faith. But when Phillips tried to depose these Commissioners, Colorado objected, and the Magistrate Judge forbade these depositions, requiring Phillips to conduct a Rule 30(b)(6) deposition first.

If Phillips cannot depose the individual Commissioners now—the very named defendants accused of religious hostility and of acting in bad faith—Phillips will not be able to depose them at all before the preliminary injunction hearing. This will leave Phillips unable to make his full case at the hearing. Meanwhile, Colorado can depose any person it wants—Plaintiffs included—and will be able to present evidence at the hearing that Phillips cannot rebut without deposing the Commissioners. To remedy this, Phillips has objected to the Magistrate Judge’s order forbidding the Commissioners’ depositions. Doc. 120. And now, with this motion, Phillips asks this Court to resolve that objection quickly and to stay expedited discovery until that objection is resolved. This is the only way that Phillips can depose the witnesses he wants—the named defendants central to this case—in time for the preliminary injunction hearing. And it is the only way that

Phillips can fully and fairly prepare—and marshal all the relevant evidence—for the upcoming preliminary injunction hearing on the same terms as Colorado.

As required by Local Rule 7.1(a), Phillips’s counsel sought to confer with opposing counsel by leaving a voicemail with, and sending an email to, Colorado’s counsel in the morning of February 18. Phillips did not hear back from Colorado’s counsel before filing this motion.

BACKGROUND

In an earlier orders, this Court said that Colorado’s disparate treatment of Phillips reveals that Defendant Commissioners are acting in bad faith and with hostility toward Phillips and his faith. Doc. 94 at 20-21. That finding made abstention under *Younger v. Harris* improper. *Id.* at 20-23. This Court also allowed Phillips to file an amended motion for a preliminary injunction (Doc. 90) and instructed the parties to prepare for an evidentiary hearing on this motion—a hearing where the Court wants “to have evidence presented ... in the form of exhibits and witnesses who testify under oath,” Doc. 96-1 at 86 (Tr. of Dec. 18, 2018 Hearing), and one where “it would be a fair” for both Colorado and Phillips, *id.* at 74. The hearing is set for March 14 and 15. Doc. 102.

The Court contemplated allowing “some expedited discovery” to prepare for this hearing and emphasized that “it needs to be done in a fair way.” Doc. 96-1 at 75 (Tr. of Dec. 18, 2018 Hearing). Colorado requested that the “expedited discovery be limited, reciprocal, and bilaterally conducted.” Doc. 95 at 9. Then the Magistrate Judge entered a Scheduling Order permitting expedited discovery that included five requests for production and interrogatories per side due February 5, and four depositions per side to be completed by February 28. Doc. 99 at 7-8.

On February 1, Colorado's counsel informed Phillips's counsel that they would not be able to produce all responsive documents until February 13. Doc. 120-1 at 3-4. Phillips's counsel objected, but indicated that, to keep the process fair, they would similarly delay their final production until February 13. *Id.* at 2. Phillips's counsel also asked that Colorado agree to extend the deposition deadline until March 5—a proposal that Colorado's counsel accepted. *Id.* at 1-2.

Phillips intended to use most—if not all—of his four expedited depositions on Commissioners. Phillips thought these depositions essential because the Commissioners are named defendants, are the officials accused of acting with hostility to Phillips, are the officials that this Court said are acting in bad faith against him, and have important information about their prosecution of Phillips and their statements about him. The need to depose these officials only grew when some of them denied making statements about Phillips that Phillips cited as proof of their hostility against him. *Compare* Doc. 51, ¶¶ 259-61, *with* Doc. 103, ¶¶ 259-61.

But when Phillips tried to depose these Commissioners, Colorado objected, and on February 5, the Magistrate Judge barred these depositions. Doc. 112; Doc. 120-2 (Tr. of Feb. 5, 2019 Hearing). The Magistrate Judge ruled that Phillips cannot depose the Commissioners on certain topics at any point in this litigation and that Phillips cannot depose the Commissioners on any topic—including their actions and statements about Phillips—until Phillips first conducts a Rule 30(b)(6) deposition and shows it to be inadequate. Doc. 112; Doc. 120-2 at 51-59 (Tr. of Feb. 5, 2019 Hearing); *see also* Doc. 120 at 5-6 (discussing the scope of this ruling).

Phillips hoped to obtain all the evidence needed for the preliminary injunction hearing from documents Colorado produced. But when Colorado finished producing those documents on February 13 and when Phillips finished reviewing these documents a few days later, he

determined that he still needs to depose individual Commissioners to obtain information about their conversations, statements, and actions, all of which are highly relevant to the issues of Colorado's hostility and bad faith.

The need to depose the Commissioners only became clearer when the parties exchanged witness lists on February 11. *See* Exs. A & B (copies of the witness lists). In these lists, Colorado identified (other than its own officials) Plaintiffs, Plaintiffs' employees, and third parties—all of whom Colorado can depose—while the vast majority of Phillips's potential witnesses are the Commissioners whom he cannot depose. *Id.* Then, on February 14, Colorado's counsel indicated to Phillips's counsel that Colorado wanted any 30(b)(6) deposition of the Commission to be conducted at the end of the expedited discovery period.

All this left Phillips in a bind. Although Phillips wanted to depose the named defendants who are Commissioners, he could not. So Phillips either had to (1) start deposing other people (and forgo deposing Commissioners during the expedited discovery period altogether) or (2) conduct the Rule 30(b)(6) deposition at the end of the expedited discovery period and then litigate his ability to depose the Commissioners—which may take weeks or months—while the expedited discovery deadline passed. With either option, Phillips would not be permitted to depose individual Commissioners before the upcoming preliminary injunction hearing. Meanwhile, Colorado is permitted to depose anyone it wants, including Plaintiffs and their employees. This leaves Phillips unable to prepare adequately for the upcoming preliminary injunction hearing and gives Colorado a substantial advantage.

ARGUMENT

Phillips should have the opportunity to prepare for and present his case at the upcoming preliminary injunction hearing on the same terms that Colorado can present its defense. That means Phillips should be able to depose essential witnesses, just as Colorado can. For Phillips, those essential witnesses include some of the Commissioners, the very officials who this Court said “are pursuing the discrimination charges against Phillips in bad faith,” Doc. 94 at 21, and who have knowledge of their own actions, statements, and motives. If Phillips cannot depose those Commissioners now, he will lose the ability to depose them before the preliminary injunction hearing and perhaps even lose the ability to depose other witnesses before this hearing as well. To avoid this unfair result, this Court should expedite the resolution of Phillips’s objection to the order forbidding these Commissioner depositions and should stay expedited discovery until this important issue is resolved.

“Control of discovery is entrusted to the sound discretion of the trial courts.” *Martinez v. Schock Transfer and Warehouse Co., Inc.*, 789 F.2d 848, 850 (10th Cir. 1986). Likewise, the decision to issue a stay of pretrial proceedings rests within the sound discretion of the trial court. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”).

Here, Phillips requests that this Court resolve Phillips’ objection on an expedited schedule and briefly stay expedited discovery to resolve this objection. Three reasons support this request.

First, Phillips would be greatly prejudiced if this objection were not resolved quickly. In his objection to the Magistrate’s ruling, Phillips has explained why he needs and deserves to

depose the Commissioners. *See* Doc. 120. Indeed, the anti-religious hostility and bad faith of the Commissioners will be one of the central issues at the upcoming preliminary injunction hearing.

This means the ability to depose these Commissioners is critical. And the ability to depose them must be resolved now, or Phillips will not be able to depose the Commissioners at all before the quickly approaching expedited discovery deadline and before the preliminary injunction hearing. Phillips needs to know now if he can depose the Commissioners so that he can plan how to use the limited depositions afforded him during this expedited discovery period. The lack of an answer makes conducting expedited discovery and preparing for the preliminary injunction hearing impossible.

To make matters more urgent, Colorado is currently able to depose whomever it wants—including Plaintiffs and anyone associated with Plaintiffs—and to prepare for the preliminary injunction hearing in the most effective way possible. This Court should not allow such an unfair and unbalanced discovery process, which will only lead to an unfair and unbalanced preliminary injunction hearing. If things continue as is, Phillips would have to support his preliminary injunction motion and engage in impeachment efforts based on inadequate information while Colorado can enter the hearing with eyes wide open, having been able to question all key individuals associated with Phillips before the hearing.

Second, Colorado would not be prejudiced if this Court quickly resolves the Commissioner deposition issue and briefly stays expedited discovery to resolve this issue. Phillips requests a brief stay to gain clarity on whom he can depose so that he can conduct expedited discovery and can enter the preliminary injunction hearing on a level playing field. The dates that Colorado has proposed for the depositions that it plans to conduct begin on February 27, so if the

Commissioner deposition issue is resolved quickly, expedited discovery will be minimally affected. In addition, Phillips would be open to extending the expedited discovery deadline and even pushing the date of the preliminary injunction hearing if necessary. Colorado may even want to alter its defense or present different evidence if Phillips can in fact depose the Commissioners. Resolving this issue quickly is in the best interests of everyone.

Third, resolving Phillips's objection and briefly staying matters will not inconvenience this Court. If anything, it is best to resolve the Commissioner-deposition issue as quickly as possible so that the parties and the Court will know how to prepare for the preliminary injunction hearing, what testimony will be presented, and which witnesses will testify. The centrality of this issue also counsels in favors of resolving the issue quickly, again to allow the Court and the parties to enter the preliminary injunction hearing with full knowledge and clear expectations. That way, the hearing will be fair to all sides, and the parties will be able to provide the evidence that this Court has requested.

CONCLUSION

Phillips wants to depose essential witnesses to prepare for the upcoming preliminary injunction hearing and to do so on an equal playing field with Colorado. To ensure this parity, Phillips asks that this Court expedite its ruling on his objection to the Magistrate Judge's ruling and stay expedited discovery until the Court decides that matter.

Respectfully submitted this 18th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2019, the foregoing document and all its exhibits were filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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Defendants.

**STATE OFFICIALS' WITNESS LIST FOR THE EVIDENTIARY HEARING ON
MARCH 14 AND 15, 2019**

The State Officials, through undersigned counsel, submit the following Witness List for the Evidentiary Hearing on March 14 and 15, 2019 on Plaintiffs' Renewed Motion for Preliminary Injunction.

WITNESSES:

Will Call –

Witness	Proposed Date of Testimony	Anticipated Length of Testimony
Aubrey Elenis	March 15, 2019	2 hrs.
Jack Phillips	March 15, 2019	2 hrs.

May Call –

Witness	Proposed Date of Testimony	Anticipated Length of Testimony
Autumn Scardina	March 15, 2019	1 hr.
Debra Phillips	March 15, 2019	½ hr.
Lisa Eldfrick	March 15, 2019	½ hr.
Stephanie Schmalz	March 15, 2019	½ hr.
An authorized representative of the Colorado Civil Rights Commission.	March 15, 2019	1 hr.
Any witness needed for impeachment, rebuttal, or authentication.	March 15, 2019	

EXHIBIT A

The State Officials reserve their right to amend their witness list based on the information learned in discovery or for any other good cause.

Respectfully submitted this 11th day of February, 2019.

PHILIP J. WEISER
Attorney General

s/ Grant T. Sullivan

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, I served a true and complete copy of the foregoing **DEFENDANTS' WITNESS LIST FOR THE EVIDENTIARY HEARING ON MARCH 14 AND 15, 2019** via email upon the counsel as indicated below:

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AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities; and
PHIL WEISER, Colorado Attorney General, in his official capacity,

Defendants.

**PLAINTIFFS' WITNESS LIST FOR HEARING ON
THE AMENDED MOTION FOR PRELIMINARY INJUNCTION**

As required by Paragraph (8)(d) of the Scheduling Order (Doc. 99), Plaintiffs Masterpiece Cakeshop and Jack Phillips disclose this witness list for the hearing on their amended motion for preliminary injunction:

EXHIBIT B

- Jack Phillips, both individually and as the representative of Masterpiece Cakeshop
- The representative of the Colorado Civil Rights Division that the Division provides as its witness under Fed. R. Civ. P. 30(b)(6)
- The representative of the Colorado Civil Rights Commission that the Commission provides as its witness under Fed. R. Civ. P. 30(b)(6)
- Commissioner Anthony Aragon¹
- Commissioner Miguel “Michael” Rene Elias
- Commissioner Carol Fabrizio
- Commissioner Charles Garcia
- Commissioner Rita Lewis
- Commissioner Jessica Pocock
- Commissioner Ajay Menon
- Any witness necessary to rebut the testimony of Defendants’ witnesses
- Any witness whose testimony becomes relevant based on discovery that has yet to occur

Plaintiffs reserve the right to call any witnesses identified by Defendants in this matter. In addition, because discovery is ongoing, it is currently unfeasible to anticipate the length of each witness’s testimony. Plaintiffs expect that all testimony supporting their motion can be completed in one day or less.

¹ Plaintiffs acknowledge that the Magistrate Judge has initially prevented them from deposing the individual commissioners. But Plaintiffs expect that the permitted Rule 30(b)(6) deposition of a Commission representative will prove inadequate. Thus, Plaintiffs reserve their right to call any of the commissioners as witnesses at the hearing.

Respectfully submitted this 11th day of February, 2019.

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EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, the foregoing document was emailed to opposing counsel listed below:

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EXHIBIT B