

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.

**DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' REPLY IN SUPPORT OF
AMENDED MOTION FOR PRELIMINARY INJUNCTION AND ACCOMPANYING
ATTACHMENTS AND MOTION TO EXPEDITE BRIEFING SCHEDULE**

Defendants, collectively the "State Officials," move to strike Plaintiffs' Reply in support of the Amended Motion for Preliminary Injunction and accompanying attachments [Docs. 127 through 127-8], as follows.

D.C. COLO.LCivR 7.1(a) CERTIFICATION

Undersigned counsel certifies that he conferred in good faith with counsel for Plaintiffs regarding the relief requested by this Motion. Specifically, counsel for the parties corresponded multiple times over the course of February 21, 22, and 24, 2019, regarding Plaintiffs' intent to file their Reply with accompanying attachments that the State Officials had designated as confidential under the parties' Stipulated Protective Order [Doc. 111]. *See* Ex. 1 (email exchanges showing conferral). Although the parties reached a tentative agreement on the procedure to be followed for filing the confidential documents under restricted access, the parties were unable to reach agreement on the propriety of Plaintiffs filing attachments to their Reply in the first instance. Plaintiffs thus oppose the relief requested herein.

LEGAL STANDARD

Under Rule 12(f), the Court “may strike from a pleading ... any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). This Court has held that it possesses discretion to strike materials that are in non-compliance with the Local Rules or that the Court “has ruled by Order may not properly be relied on.” *Dubrovin v. The Ball Corp. Consolidated Welfare Benefit Plan for Employees*, No. 08-cv-00563-WYD-MKT, 2009 WL 5210498, at *1 (D. Colo. Dec. 23, 2009) (citing *Lewis v. Michaels Stores, Inc.*, No. 05-cv1323, 2007 WL 2254502, at *13 (M.D. Fla. 2007) (“the court may strike an affidavit or brief as a sanction for noncompliance with court orders”)).

ARGUMENT

I. Plaintiffs’ Reply and its attachments should be stricken because they violate this Court’s briefing schedule order and established practice.

Plaintiffs filed their Reply in support of the Amended Motion for Preliminary Injunction on February 22, 2019 [Doc. 127], completing the briefing schedule that this Court ordered five weeks earlier [Doc. 102]. In support of their Reply, Plaintiffs attach eight documents that were recently produced by the State Officials during expedited discovery. *See* Docs. 127-1 to 127-8. Plaintiffs’ Reply discusses each of these attachments, some in great detail. *See, e.g.*, Doc. 127, pp. 7 n. 5, 14. Because Plaintiffs’ Reply and its attachments (1) violate this Court’s briefing schedule order, and (2) run contrary to the established practice that forbids the inclusion of new evidentiary material for the first time in a reply, Plaintiffs’ Reply and its attachments should be stricken. Plaintiffs should be ordered to file a revised, conforming Reply as soon as possible.

First, Plaintiffs’ Reply and its attachments violate this Court’s January 16, 2019 briefing schedule order [Doc. 102], which permits the parties to attach evidentiary materials to their

principal briefs but included no such provision for replies. Specifically, the briefing schedule order stated, “Plaintiffs may attach pertinent evidentiary documents or information to their renewed motion for preliminary injunction and Defendants may attach pertinent evidentiary documents or information to their response.” Doc. 102, p. 2. Nowhere does the Court’s briefing schedule order authorize Plaintiffs to attach documents to their Reply.

The Court’s explicit grant of authorization for attachments to the parties’ principal briefs—and the corresponding *lack* of authorization for attachments to the Reply—is unsurprising given the procedural background that led the Court to enter its briefing schedule order. The parties filed their Joint Statement concerning Proposed Dates for Filings and an Evidentiary Hearing in connection with Plaintiffs’ Amended Motion for Preliminary Injunction [Doc. 96] on January 11, 2019. In that joint filing, the parties disagreed as to the deadline for Plaintiffs’ Reply in support of their Amended Preliminary Injunction Motion. *See* Doc. 96, pp. 2-4. The State Officials proposed February 15, 2019, as the Reply’s deadline, but Plaintiffs requested February 22, 2019, to provide themselves the full two weeks normally allotted for replies. In turn, the State Officials comprised and agreed to the later February 22 deadline, but only if the parties’ briefs were “limited to legal argument only and do not reference or attach any factual information or documents obtained during the limited expedited discovery window.” Doc. 96, p. 3. The State Officials made this proposal because they recognized that expedited discovery would be completed or nearly completed shortly before Plaintiffs’ Reply was filed, giving them an unfair advantage in previewing for the Court the information learned during

expedited discovery.¹ The State Officials also pointed out that limiting the parties' briefs to legal argument only was consistent with the Court's preference for an evidentiary hearing on Plaintiffs' amended motion for a preliminary injunction and its express rejection of mere affidavits or declarations. Doc. 96-1, Tr. of Dec. 18, 2018 Hearing at p. 82, ll.1-3 ("If you don't want to have evidence, then I guess you don't want me to seriously consider a preliminary injunction.").

After reviewing the parties' respective positions, this Court struck an appropriate balance by allowing each side to attach evidentiary material to their principal briefs but not the Reply. Doc. 102, p. 2. Plaintiffs' act of attaching documents to their Reply that were recently produced during expedited discovery, in violation of this Court's order, prejudices the State Officials. The State Officials have no ability to respond to Plaintiffs' characterizations of the discovery material—many of which are inaccurate or distorted—in advance of the upcoming preliminary injunction hearing. Nor do the State Officials have the corresponding opportunity to preview for the Court documents produced *by Plaintiffs* that are favorable to the State Officials' defense of Plaintiffs' claims. Plaintiffs' one-sided presentation of the information learned in expedited discovery thus risks undermining this Court's stated goal of conducting a fair and impartial hearing on Plaintiffs' amended motion for a preliminary injunction. *See* Doc 96-1, p. 74, ll.9-13. Plaintiffs' Reply and its attachments should therefore be stricken as a sanction for violating this Court's briefing schedule order. *See Dubrovin*, 2009 WL 5210498, at *1.

¹ Indeed, the State Officials' concern over the timing of the Reply's deadline turned out to be well-founded. The parties completed their final exchange of documents on February 13, 2019, nine days before Plaintiffs' February 22 deadline for their Reply. Plaintiffs improperly took advantage of this timing by attaching the newly-produced documents to their Reply.

Second, besides violating this Court’s briefing schedule order, Plaintiffs’ Reply and its attachments run afoul of the established practice in this circuit that forbids the consideration of “new evidence offered for the first time in a reply brief.” *Bennett v. Sprint Nextel Corp.*, No. 09-2122-EFM, 2013 WL 1197124, at *2 (D. Kan. March 25, 2013) (citing *Starkey ex rel. A.B. v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1259 (10th Cir. 2009)); *LNV Corp. v. Hook*, No. 14-cv-00955-RM-CBS, 2015 WL 5679723, at *3 (“The Court will not rely on any new materials or arguments raised for the first time in [a] Reply”). A plaintiff’s tardiness in providing evidentiary material attached to a reply “effectively deprives a defendant of any opportunity to meaningfully respond.” *Bennett*, 2013 WL 1197124, at *2.

Here, that is precisely what has occurred. Plaintiffs’ belated inclusion of eight separate attachments to their Reply—and their extended discussion of those attachments in their Reply—effectively deprives the State Officials of any meaningful opportunity to respond to Plaintiffs’ newly-asserted arguments. As indicated, the State Officials disagree strongly with Plaintiffs’ descriptions and characterizations of some of the newly-included evidence, yet Plaintiffs’ decision to ignore this Court’s briefing schedule order prevents the State Officials from setting the record straight in advance of the preliminary injunction hearing. Therefore, Plaintiffs’ Reply discussing the attachments, and the attachments themselves, should be stricken. Plaintiffs should be ordered to file a revised, conforming Reply that omits any reference to the new discovery material.²

² In the alternative, the State Officials request leave to file a sur-reply to respond to Plaintiffs’ arguments and reliance on the newly-included materials. *See Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005) (“Generally, the nonmoving party should be given an opportunity to respond to new material raised for the first time in the movant’s reply.”).

II. The parties' briefing and the Court's consideration of the instant motion to strike should be expedited.

If this Court does not summarily strike the Reply and its attachments, it should order that the parties' briefing on the instant request to strike be expedited. The March 14-15, 2019, hearing on Plaintiffs' amended motion for preliminary injunction is approaching rapidly. Both the Court and the parties should have certainty in advance of that hearing regarding the arguments and evidentiary materials that are properly before the Court as part of the briefing. A typical five-week briefing schedule on the instant motion to strike will not provide that certainty.

The State Officials respectfully propose that (1) Plaintiffs' Response be due on or before February 27, 2019, and (2) the State Official's optional Reply be due on or before March 1, 2019.

CONCLUSION

For the foregoing reasons, Plaintiffs' Reply and its accompanying attachments [Docs. 127 through 127-8] should be stricken and Plaintiffs ordered to file a revised, conforming Reply.

Respectfully submitted this 25th day of February, 2019.

PHILIP J. WEISER
Attorney General

s/ Grant T. Sullivan
s/ Jacquelynn Rich Fredericks

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*Counsel of Record
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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, I served a true and complete copy of the foregoing **DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' REPLY IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION AND ACCOMPANYING ATTACHMENTS AND MOTION TO EXPEDITE BRIEFING SCHEDULE** via email upon the counsel as indicated below:

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/s Jacquelynn Rich Fredericks
Jacquelynn Rich Fredericks

Grant Sullivan

From: Grant Sullivan
Sent: Sunday, February 24, 2019 3:04 PM
To: 'Ryan Tucker'
Cc: Vincent Morscher; Jacquelynn Rich Fredericks; Michael McMaster; Leslie Bostwick
Subject: RE: Masterpiece v. Elenis

Ryan,

We do not oppose your filing of a motion to restrict access on Monday or Tuesday, although we reserve our right to file a motion to strike.

Regards,

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From: Ryan Tucker [mailto:rtucker@adflegal.org]
Sent: Friday, February 22, 2019 4:12 PM
To: Grant Sullivan
Cc: Vincent Morscher; Jacquelynn Rich Fredericks; Michael McMaster; Leslie Bostwick
Subject: RE: Masterpiece v. Elenis

Grant,

Thanks for getting back to us on this matter quickly. We respectfully disagree with your reading of the Court's briefing schedule order. In the filing that led to that order, the defendants argued that "the parties' briefs on the amended preliminary injunction motion [should be] limited to legal argument only." Doc. 96 at 3. In response, Plaintiffs objected to "forfeit[ing] their right to reference any information or attach any document that they possess now or in the future in support of their amended motion for preliminary injunction or any associated briefing." *Id.* at 4. The Court's subsequent order was silent on whether materials could be attached to the reply brief. We do not read that as forbidding us from attaching materials. So we will oppose any motion to strike that you might file.

As you've requested, we confirm that we are not making public any confidential information, either through discussion in a pleading or by filing on the publicly accessible docket any document that has been marked confidential. We will file our entire reply and all exhibits as restricted documents pursuant to Local Rule 7.2. Paragraph 12 of the Protective Order permits us to file documents under restricted access so long as we comply with that rule. That rule provides that those

documents will be subject to restricted access so long as a motion to restrict is filed shortly thereafter (within 14 days). We will file a motion to restrict by Monday or Tuesday, so all the documents will remain confidential consistent with the terms of the Protective Order. Please let us know your position on that motion to restrict.

Thanks,
Ryan

From: Grant Sullivan [mailto:Grant.Sullivan@coag.gov]
Sent: Friday, February 22, 2019 10:56 AM
To: Ryan Tucker <rtucker@adflegal.org>
Cc: Vincent Morscher <Vincent.Morscher@coag.gov>; Jacquelynn Rich Fredericks <Jacquelynn.RichFredericks@coag.gov>; Michael McMaster <Michael.McMaster@coag.gov>; Leslie Bostwick <Leslie.Bostwick@coag.gov>
Subject: RE: Masterpiece v. Elenis

Ryan,

Thank you for notifying us of your intent to make public documents that we labeled as confidential pursuant to the Stipulated Protective Order ("Order") and your objection to our designating these documents as confidential.

At the outset, your intent to attach documents to your Reply runs contrary to the Court's briefing schedule order. *See* Doc. 102. The briefing schedule order permits Plaintiffs to attach documents to their amended PI motion, and it permits the State Officials to likewise attach documents to their Response. It does *not* authorize Plaintiffs to attach documents to their Reply. The Court entered this order following the parties' Joint Report re: PI Filings [Doc. 96], in which the State Officials argued that Plaintiffs should not be permitted to attach evidentiary materials to their Reply, as it would give Plaintiffs an unfair advantage in previewing for the Court information learned in expedited discovery. It's therefore unsurprising that the Court's briefing schedule order does not authorize Plaintiffs to attach documents to your Reply.

If you choose to violate the briefing schedule order, we will consider a motion to strike. Please consider this our conferral attempt on such a motion, as required by the local rules, and provide us your position.

In addition, we reviewed the three documents you referenced and believe that they are covered by the Stipulated Protective Order and must not be made public by attaching them to your Reply brief. As an initial matter, paragraph 10 of the Order provides the parties 10 days to resolve disputes regarding whether a document is covered by the Order, so if Plaintiff's disclose these documents today in a public filing, or discuss the confidential information in a public pleading, Plaintiffs would be in direct violation of the Order. For that reason, we object to your proposal to file an unredacted copy of the Reply that discusses confidential information, as it is not contemplated by either the Order or local rule 7.2.

The two draft letters of determination clearly include information gathered during the investigation and are covered by § 24-34-306(3). The fact that Plaintiffs disclosed the final Letter of Determination by attaching it to the Complaint does not change the confidentiality of the draft determinations. The State Officials had no input or control over the release of the final Letter of Determination, and the drafts have never been disclosed publically.

The Executive Session transcript that the Magistrate Judge required us to disclose to Plaintiffs also falls under § 24-34-306(3), as an effort "to eliminate such discriminatory or unfair practice by conference . . ." The inclusion of the word "conference" in the statute indicates the legislature's intent to broaden the definition to include situations other than conciliation. When the Civil Rights Commission met to review the Scardina matter, it was in conference under its powers and duties under § 24-34-305(1).

The Executive Session transcript is also protected by § 24-6-401(2)(d.5)(I)(D), which provides that "[n]o portion of the record of an executive session of a state public body shall be open for public inspection ... except upon the

consent of the state public body or as provided in [inapplicable provisions].” The Civil Rights Commission has not consented to the public release or inspection of the transcript. Our Stipulated Protective Order clearly contemplates designating this type of information as confidential, as it defines confidential information in paragraph 2 to include “things that qualify for protection under Federal Rule of Civil Procedure 26(c).”

Given the above, please confirm with us today that you will not be attaching documents to your Reply, or otherwise making public any confidential information, either through discussion in a pleading or by attaching a publicly-accessible document that has been marked confidential.

Regards,

Grant T. Sullivan

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From: Ryan Tucker [mailto:rtucker@adflegal.org]
Sent: Thursday, February 21, 2019 5:22 PM
To: Grant Sullivan
Cc: Vincent Morscher
Subject: Masterpiece v. Elenis

Grant,

We intend to file three documents attached as exhibits to our reply brief tomorrow that the defendants have labeled confidential under the terms of the Protective Order. Those documents are (1) the minutes of the Commission’s Executive Session meeting on October 2, 2018 (beginning at Bates No. 0006300), (2) the draft of the probable-cause determination in the Scardina matter that begins at Bates No. 0001643, and (3) the draft of the probable-cause determination in the Scardina matter that begins at Bates No. 0001647.

We do not think that those documents were properly marked confidential consistent with the terms of the Protective Order. Confidential information under that order includes “information required to remain confidential pursuant to § 24-34-306(3), C.R.S.” That includes “the information gathered during the investigation, or the efforts to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion unless such disclosure is made in connection with the conduct of the investigation.” Colo. Rev. Stat. 24-34-306(3). The minutes of the executive session do not fall under that statute because they do not constitute information gathered during the investigation, nor do they pertain to conciliation efforts. And keeping in mind that the final probable-cause determination is already public, the draft determinations do not disclose any additional information gathered during the investigation or related to the conciliation efforts.

We ask that you consent to our attaching those three documents as exhibits to our reply brief. In the alternative, we provide this as written notice, pursuant to Paragraph 10 of the Protective Order, of an intent to object to the designation of those documents as confidential. This will commence the 10 business days during which we hope to resolve this

dispute. If we cannot, the plaintiffs will file a motion or other submission with the court requesting that the court determine whether the disputed information should be subject to the terms of the Protective Order.

If you decide not to consent by tomorrow at 1:00 pm Mountain time, we plan to file an unredacted version of the reply brief and those three exhibits as “restricted documents” pursuant to Local Rule 7.2, along with a redacted version of the reply brief and any non-confidential exhibits on the court’s public docket. If you have any objection to our proceeding this way, please let us know and explain the basis for that objection.

Thanks,
Ryan



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