

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 capacity, *et al.*,

Defendants.

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**STATE OFFICIALS' RESPONSE TO PLAINTIFFS' OBJECTION TO THE  
MAGISTRATE JUDGE'S ORDER [DOC. 120]**

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Defendants, (collectively, the "State Officials"), hereby submit the following Response to Plaintiff's Objection [DOC. 120] to the Magistrate Judge's Order [DOC. 112]. In support thereof, the State Officials state as follows:

**INTRODUCTION**

Plaintiffs ask this Court to overrule the Magistrate Judge's decision with respect to individual depositions of the Commissioners, relying largely upon an argument that not permitting them such depositions is one-sided. As set forth below, that is not the standard by which this Court reviews an objection under Fed. R. Civ. P. 72(a). Far from showing that the Magistrate Judge's decision was clearly erroneous and contrary to law, Plaintiffs have not provided this Court with any authority that permits them to depose individual officers in quasi-prosecutorial or quasi-judicial roles who are actively adjudicating an on-going state proceeding. Further, the Magistrate Judge's decision strikes a reasonable balance between Plaintiff's desire for evidence and the State Officials' entitlement to immunity and privilege under the *Morgan*

doctrine. Finally, Plaintiffs have failed to avail themselves of the reasonable avenue for discovery provided by the Magistrate Judge's decision. At this point, their claim that a Fed. R. Civ. P. 30(b)(6) deposition would be inadequate is premature and unconvincing.

### **PERTINENT FACTS AND PROCEDURAL HISTORY**

On January 29, 2019, the Parties provided the Magistrate Judge with a Joint Statement outlining the nature of their discovery dispute. Doc. 113. The core of the dispute between the Parties centers on Plaintiffs' proposed deposition of some of the individual Commissioners. Specifically, Plaintiffs want to depose several Commissioners and ask them about their discussions about Jack Phillips and Masterpiece Cakeshop. Unsatisfied with the facts underlying this case, Plaintiffs also wanted to question sitting Commissioners about their personal beliefs as they relate to religion, view on LGBT issues, personal characteristics, and their decisions in other cases. *See* Doc. 113, p. 2 and 16. The State Officials objected to these proposed depositions on several grounds. The Commissioners are quasi-prosecutorial and quasi-judicial officials. Doc. 113, p. 23–25. They have absolute and qualified immunity from this type of invasive discovery. Further, like all judicial officers, their mental impressions and deliberative process are privileged. Doc. 113, p. 27. Finally, the Commissioners' personal beliefs, views, characteristics, and associations are irrelevant. Doc. 113, p. 29.

Following supplemental briefing, the Magistrate Judge held a hearing on February 5. At the hearing, the Parties presented extensive argument. After which, the Magistrate Judge denied Plaintiffs' request to depose individual Commissioners. Doc. 112, p. 2; Doc. 120-2, p. 51. The Magistrate Judge denied, with prejudice, Plaintiffs' request to depose individual Commissioners about their "personal feelings about religion, gay rights, and the topics that underlie the competing First Amendment and Fourteenth Amendment issues here." Doc. 112, p. 2; Doc. 120-

2, p. 51–52. The Magistrate Judge denied, without prejudice, Plaintiffs’ request to depose the Commissioners about “decisions or discussions they had about this particular case, similar cases, or Plaintiff in general.” Doc. 112, p. 2; Doc. 120-2, p. 52–53.

Instead of the proposed depositions of individual Commissioners, the Magistrate Judge exercised his discretion to craft a solution that balanced the Parties’ competing concerns. The Magistrate Judge permitted the Plaintiffs to conduct a Fed. R. Civ. P. 30(b)(6) deposition of the Commission. The Magistrate Judge provided for relatively broad areas of inquiry within the proposed Fed. R. Civ. P. 30(b)(6) deposition, including: the “rationale for the decision that was made and any conversations that the commissioners had with each other outside of open meetings and exclusive of attorney client communications.” Doc. 112, p. 2; *see also* Doc 120-2, p. 53–54. The Magistrate Judge encouraged that the designee be prepared to address any third-party conversations individual Commissioners may have had regarding Plaintiffs or the administrative complaint. Doc. 120-2, p. 53–54. In addition, the Magistrate Judge’s order was incremental in nature, and expressly left open the possibility of individual depositions at a later date, if such proved necessary subsequent to the taking of an institutional deposition. *Id.* p. 54–55. Finally, the Magistrate Judge ordered that the State Officials produce “any documents that are communications between commissioners (emails or correspondence not protected by the attorney client privilege).” Doc. 112, p. 2.

Consistent with the Scheduling Order and the Magistrate Judge’s direction during the Scheduling Conference, the State Officials have made consistent efforts to move discovery forward. Doc. 97, Doc. 98, Doc. 99; Ex. A, G. Sullivan Email, dated 2/17/19 (requesting Plaintiffs provide a Rule 30(b)(6) notice, with deposition topics for the Commission); Ex. B, G.

Sullivan Letter, dated 2/21/19 (same). On February 6 and 13, 2019, the State Officials provided responses to Plaintiffs' written discovery and provided approximately 6,304 pages of documents.

On February 14, 2019, counsel for the State Officials attempted to confer with Plaintiffs' counsel regarding scheduling depositions. Ex. B, p. 2. Plaintiffs' counsel indicated they had made no decision regarding whom they wished to depose. *Id.* Plaintiffs were further unable to provide dates upon which they themselves were able to sit for deposition. *Id.* Counsel for the State Officials followed up via email the next day, again asking to confirm dates for Plaintiffs' depositions. *Id.* Due to Plaintiffs' failure to confirm dates, the State Officials were forced to serve subpoenas duces tecum in order to secure the depositions of Mr. Phillips, Ms. Debi Philips, and Ms. Lisa Eldfrick. In light of the filing of their recent motion seeking a stay of the expedited discovery period, it is unclear whether Plaintiffs intend to attend their own depositions.<sup>1</sup>

Finally, counsel for the State Officials has made multiple requests for a list of anticipated topics for Plaintiffs' Fed. R. Civ. P. 30(b)(6) deposition of the Commission, so that the State Officials may prepare a designee. Ex. A; Ex. B. Only after the State Officials sent a letter to Plaintiffs on February 21, 2019, Ex. B, did Plaintiffs finally provide a list of topics on February 22, 2019, at 4:31 p.m. In the interim, on February 18, 2019—thirteen days after the discovery hearing—Plaintiffs filed an objection to the Magistrate Judge's ruling prohibiting depositions of individual Commissioners. In their objection, Plaintiffs argue that a Fed. R. Civ. P. 30(b)(6) deposition of the Commission, which they have not yet availed themselves of, will be inadequate and that they have insufficient time remaining in which to pursue the discovery. Doc. 120.

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<sup>1</sup> Plaintiffs previously acknowledged an objection does not stay a prior decision by the Magistrate Judge. Doc. 89, p. 7.

## STANDARD OF REVIEW

Consistent with Fed. R. Civ. P. 72(a), a district court will modify or set aside a magistrate judge’s order only if it is “clearly erroneous” or “contrary to law.” 28 U.S.C.A. § 636(b)(1)(A); *Gomez v. Martin Marietta Corporation*, 50 F.3d 1511 (10th Cir. 1995); *Ariza v. U.S. West Communications, Inc.*, 167 F.R.D. 131 (D. Colo. 1996). A ruling is clearly erroneous when, after viewing the record as a whole, the Court is left with a “definite and firm conviction that a mistake has been made.” *Murphy v. Gardner*, 413 F. Supp. 2d 1156, 1162 (D. Colo. 2006) (citing *Ariza*, 167 F.R.D. at 133 and *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)).

## ARGUMENT

Altering a magistrate judge’s non-dispositive orders is “extremely difficult to justify.” 12 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 3069 (2d ed.1997). Plaintiffs object to the Magistrate Judge’s ruling for two reasons: (1) claims of bad faith are sufficient to justify individual depositions of the Commissioners, and (2) they should be permitted to question Commissioners about their personal views on religious freedom, religion, and gay rights. But the Magistrate Judge’s decision denying Plaintiffs’ request to depose individual Commissioners was neither clearly erroneous nor contrary to law. Finally, as a matter of prudent policy, this Court should not reward Plaintiffs for their failure to pursue available discovery efficiently. Thus, Plaintiffs’ objection should be overruled.<sup>2</sup>

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<sup>2</sup> Plaintiffs’ objection and the related motion seeking to stay discovery and to expedite briefing should also be denied due to their failure to confer in good faith consistent with D.C.COLO.LCivR 7.1. Plaintiffs’ “conferral” consisted of a voicemail and an email on President’s Day, February 18, 2019, which is a state and federal holiday. [Doc. 120, p. 7; Doc. 121, p. 3]. Plaintiff filed their objection and motion later the same day, before counsel for the State Officials returned from the President’s Day holiday. A “single email, letter, or voicemail ... ordinarily does not constitute a good faith effort to confer.” See *Connolly v. Toll Bros.*,

**I. The Magistrate Judge’s decision was neither erroneous nor contrary to law because it strikes an appropriate balance between the State Officials’ immunities and the Plaintiffs’ need for discovery.**

The Magistrate Judge’s ruling was neither clearly erroneous nor contrary to law. The decision appropriately balanced the State Officials’ immunity as quasi-prosecutors and quasi-judicial officers. The Magistrate Judge’s order also correctly accounts for State Officials’ privileged mental processes under the *Morgan* Doctrine.

**A. The State Officials are immune and entitled to protections from burdensome civil discovery.**

The Magistrate Judge expressly relied upon this Court’s prior finding that the State Officials are immune for their work as quasi-prosecutors in support of his decision. Doc. 120-2, p. 49–50. Plaintiffs cite no on-point authority, and the State Officials are aware of none, standing for the proposition that Plaintiffs are entitled to depose immune parties. The Magistrate Judge’s ruling is consistent with the robust body of authority that declines to impose the burdens of discovery upon those who are entitled to immunity. Thus, the Plaintiffs are unable to show that the Magistrate Judge’s decision was clearly erroneous or contrary to law.

An immunity defense is both “a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation[,]” such as discovery. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (internal quotation marks and citation omitted); *see also Da Vinci Inv., Ltd. P’ship v. Parker*, 622 Fed. Appx. 367, 377 (5th Cir. 2015) (treating discovery questions the same whether qualified immunity or absolute immunity is raised). The Supreme Court has recognized the tension created when a plaintiff alleges a claim against a public official that requires proof of a

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No. 15-CV-00380-KMT, 2015 WL 2345639, at \*1 (D. Colo. May 14, 2015) (citing *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003)). As a result, Plaintiffs failed to confer with the State Officials in good faith.

wrongful motive. In such an instance, “the trial court must exercise its discretion in a way that protects the substance” of the immunity defenses. *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998) (addressing a claim of qualified immunity). The Supreme Court emphasized that a trial court “must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.” *Id.* at 597–98. Even when discovery is permitted, the Supreme Court identified several tools available to trial courts to narrowly tailor discovery when a public official is targeted by a lawsuit. For example, a trial court “may limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects, as required to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. And the court may also set the timing and sequence of discovery.” *Id.* at 599. In short, trial courts are afforded significant latitude and flexibility to resolving conflicts between immune parties and the need for discovery.

Here, the Magistrate Judge appropriately exercised his discretion to balance the competing interests of the parties. As the Magistrate Judge recognized, this Court has already concluded that the State Officials are entitled to absolute immunity as quasi-prosecutors. In recognition of that finding, the Magistrate Judge’s ruling “attempt[ed] to balance [these] two competing concerns, which is to protect officials from disruptive discovery and to still allow discovery into the rationale of the State’s decision.” Doc. 120-2, p. 50.

The Magistrate Judge’s decision correctly denied, with prejudice, Plaintiffs’ attempt to depose the Commissioners about their personal beliefs and affiliations, acknowledging that Plaintiffs’ request “goes too far.” Doc. 120-2, p. 26. This decision is not clearly erroneous or contrary to law. To the contrary, the decision is in line with the Tenth Circuit’s specific acknowledgment that “religious beliefs or membership affiliation are presumed not to be

relevant.” *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 660 (10th Cir. 2002) (citing *Idaho v. Freeman*, 507 F.Supp. 706, 729 (D. Idaho 1981)).<sup>3</sup> This rationale is true even when a judge, or quasi-judicial officer, has “been a leader in [an organization] that had taken a public position on the matter before the court.” *Id.*

The Magistrate Judge also denied Plaintiffs’ attempt to depose individual Commissioners about their rationale for the specific decision in this case. The Magistrate Judge denied this request without prejudice. Instead, the Magistrate Judge exercised his discretion to “avoid[] disruptive discovery” and permitted a Fed. R. Civ. P. 30(b)(6) deposition, which would include any conversation or communication the Commissioners had with each other or third parties that occurred outside of an open meeting.<sup>4</sup> Doc. 120-2, p. 53. This limitation is well within the Magistrate Judge’s discretion to ensure “that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.” *Crawford-El*, 523 U.S. at 597–98.

The Magistrate Judge’s decision properly rests on this Court’s conclusion that quasi-prosecutorial immunity protects the State Officials. Yet quasi-judicial immunity and qualified immunity apply equally and serve to support the Magistrate Judge’s decision. First, the State Officials’ motion to dismiss only raised quasi-prosecutorial immunity because the bare allegations in Plaintiffs’ complaint pertained to their prosecutorial roles. However, now that Plaintiffs seek discovery that invades their quasi-judicial roles, absolute quasi-judicial immunity is implicated. Second, as argued in the State Officials’ motion to dismiss, the State Officials are

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<sup>3</sup> Notably, *Bryce* was decided in the context of a request for Judge Brimmer to recuse himself because he was member of an Episcopal church. Plaintiffs here have not requested a recusal of any of the Commissioners, even though Colorado statute provides them that opportunity. §24-4-105(3), C.R.S.

<sup>4</sup> Colorado’s Open Meetings Law requires that any meeting of the Commission where public business is discussed be a public meeting. §24-6-402, C.R.S.

also protected from the burdensome and unnecessary discovery proposed by Plaintiffs. *See* Doc. 43, p. 21–24. This Court previously ruled that it was unnecessary to reach the State Officials’ claim of qualified immunity because they were also absolutely immune. Doc. 94, p. 34. True. But qualified immunity provides an additional basis to support the Magistrate Judge’s decision, which far from being contrary to law is supported by multiple immunities.

**B. The *Morgan* Doctrine prohibits the requested depositions.**

The Magistrate Judge’s decision is supported by the *Morgan* doctrine. The central tenant of the *Morgan* doctrine is that courts should not “probe the mental processes” of administrative officials, such as the State Officials in cases conducted under the APA. *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1139 (10th Cir. 1999) (citing *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941)). This is because the State Officials are “presumed to be objective” and “capable of judging a particular controversy fairly on the basis of its own circumstances.” *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (quotation omitted). This presumption is not overcome when the official has “taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.” *Id.* A court in this district has characterized this prohibition as “strict.” *Dalcour v. City Of Lakewood*, 08-CV-00747-MSK-KLM, 2008 WL 3845289, at \*2 (D. Colo. Aug. 14, 2008) (citing *Morgan*, 313 U.S. at 422).

Yet this type of information is precisely what Plaintiffs seek. The Magistrate Judge was correct to protect the State Officials from depositions that only sought to inquire about these inappropriate and irrelevant topics. The decision serves to fulfill the purpose of the *Morgan* doctrine, which “allows officials to perform their duties without fear of harassment from lawsuits.” *Franklin Sav. Corp.*, 180 F.3d at 1139 (quotation omitted).

**C. The limited exception set forth in *Overton Park* is inapplicable.**

The Magistrate Judge’s decision to limit the Plaintiffs to a Fed. R. Civ. P. 30(b)(6) deposition is an appropriate exercise of his discretion. It properly balances the Plaintiffs’ need for information, while still protecting the State Officials’ deliberative and mental processes, which are protected under the *Morgan* doctrine. Plaintiffs incorrectly assert that they have satisfied an exception to the *Morgan* doctrine by alleging bad faith.

The only relevant exception to the *Morgan* doctrine is when a party can make “a *strong* showing of bad faith or improper behavior.”<sup>5</sup> *Id.* (emphasis added). In this context, courts have imposed a high standard on plaintiffs seeking to demonstrate bad faith, for example permitting discovery when the government has purposefully withheld negative documents or repeated instances of perjury. *See Tafas v. Dudas*, 530 F. Supp. 2d 786, 797–98 (E.D. Va. 2008) (collecting cases). Plaintiffs have failed to make such a showing.

At the outset, it is important to emphasize what precisely this Court previously ruled upon. A large portion of Plaintiffs’ argument rests upon their mistaken belief that this Court has already made a factually and legally binding decision with respect to the Plaintiffs’ showing of bad faith. This is inaccurate.

When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(1), courts must accept well-pleaded allegations as true. *See Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). Although the State Officials disputed exactly which facts were well pleaded, this Court applied this principle. Doc. 94, p. 15. But this Court’s assumption that certain facts are true is not the same as a finding of fact. *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188,

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<sup>5</sup> The Plaintiffs do not raise the second exception to the *Morgan* doctrine, which is a “very narrow exception for cases in which a lack of contemporary findings or other administrative record makes effective judicial review impossible without examining the decisionmaker.” *See Franklin Sav. Corp.*, 180 F.3d at 1139 n.19.

1191–92 (10th Cir. 2009) (when deciding a motion to dismiss, a court does not ask “whether the allegations are likely to be true; the court must assume them to be true.”). How could it be? Plaintiffs had presented no evidence to court at the motion to dismiss stage, nor had the State Officials.<sup>6</sup>

Similar to Plaintiffs’ misapprehension of this Court’s order, the Plaintiffs repeatedly suggest that the State Officials have conceded that they are pursuing the discrimination charges against Phillips in bad faith. Doc. 120, p. 6, 8, and 10. Again, this is inaccurate. A complete reading of the transcript shows that counsel for the State Officials acknowledged that “we’re at a different stage,” and cabined her discussion within the appropriate standard of review for Fed. R. Civ. P. 12(b)(1) motion:

...the decision made at that stage under 12(b)(1) with respect to *Younger* is a different analysis than the analysis that has to be made currently under *Morgan* and it’s a different standard.

Doc. 102-2, p. 46–47. The State Officials only admitted, as they must, that courts assume well-pleaded facts as true in review of Fed. R. Civ. P. 12(b)(1) motions.<sup>7</sup> Thus, this Court has not made a factual finding of bad faith, and the State Officials have certainly not admitted bad faith.

In any event, the Plaintiffs have failed to marshal sufficient evidence to satisfy their burden of a “strong showing” of bad faith under *Overton Park*. The Magistrate Judge, who assumed this Court had already found some degree of bad faith, correctly determined that Plaintiffs had failed to make a sufficient showing in order to inquire into the State Officials’

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<sup>6</sup> The Magistrate Judge appears to read this Court’s order as also making findings of fact, based on two allegations: (1) Phillips declined to create a blue and pink cake because of a religious objection, and (2) in prior cases, Colorado has permitted other bakeries to decline to create cakes they deem objectionable. Doc. 120-2, p. 46. Of course, these allegations do not establish bad faith. But if this Court has made a factual finding—before the parties had presented it with evidence—the Court should clarify its ruling and identify the basis for its factual findings.

<sup>7</sup> The State Officials maintain that Plaintiffs have failed to satisfy their heavy burden to overcome *Younger v. Harris*, 401 U.S. 37 (1971).

personal beliefs. Doc. 120-2, p. 52. The Magistrate Judge correctly articulated the relevant standard, noting that Plaintiffs must make a “clear” and “strong” showing. *Id.* And the Magistrate Judge appropriately exercised his discretion in determining that Plaintiffs had fallen short of this high bar. Plaintiffs fail to show that the Magistrates Judge’s decision is clearly erroneous or contrary to law. Indeed, they cannot. The objection should be overruled.

**II. This Court should not consider new evidence that was not before the Magistrate Judge.**

Plaintiffs attach new, dubious “evidence” in support of their objection. Doc. 120-3. This Court should disregard that information for four reasons.

*First*, consistent with the Magistrate Judge’s ruling, the Commissioner’s Fed. R. Civ. P. 30(b)(6) designee will be prepared to discuss all Commissioner conversations with third parties regarding either Plaintiffs or the state administrative case. Plaintiffs have not demonstrated, through the William’s declaration or otherwise, that the Fed. R. Civ. P. 30(b)(6) approach as delineated by the Magistrate Judge is inadequate. At the very least, Plaintiffs should be obliged to avail themselves of the available discovery before unilaterally declaring it inadequate.

*Second*, Plaintiffs failed to timely present the Williams’ declaration to the Magistrate Judge in the first instance, and thus, this Court should not consider it. Although Fed. R. Civ. P. 72(b)(3) provides that a Court may receive additional evidence with respect to an objection on a *dispositive* issue, Fed. R. Civ. P. 72(a) that governs *nondispositive* rulings by a magistrate judge contains no equivalent provision. “Common sense and efficient judicial administration dictate that a party should not be encouraged to make a partial presentation before the magistrate...and then make another attempt entirely when the district judge reviews objections to an adverse [ruling] issued by a magistrate.” *Aikens v. Shalala*, 956 F. Supp. 14, 22–23 (D.D.C. 1997) (citing 7 J. Moore, *Moore’s Federal Practice* ¶ 72.04 [10.–2] at 72–71). Indeed, it is the Court’s

obligation to “assess whether a Magistrate Judge’s decision was ‘clearly erroneous or contrary to law’ only based on the facts actually *before* the Magistrate Judge,” *Tafas v. Dudas*, 530 F. Supp. 2d 786, 796 (E.D. Va. 2008) (emphasis added), “[t]hus, the Court [should] not consider these...materials.” *Id.*

*Third*, permitting Plaintiffs to tender new evidence at this stage frustrates the purpose of having a magistrate judge and prejudices the State Officials. This Court delegated the handling of discovery issues to Magistrate Judge Varholak. The Magistrate Judge solicited two separate briefs from each party regarding this issue, Docs. 113, 114, 115, and held extended oral argument on the matter. Doc. 120-2. At no point in either the briefing or the oral argument did Plaintiffs raise the specter of information from this alleged witness. *Id.* Instead, 13 days after the discovery hearing, without properly conferring, on a federal holiday, and with only 15 calendar days remaining in the parties’ expedited discovery window, Plaintiffs filed their objection and attached previously undisclosed, vague evidence in support of a request to overrule the Magistrate Judge’s decision. “[A]llowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrate Act.” *Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 638–39 (9th Cir. 1988). It is for these reasons that parties must take before the Magistrate Judge “not only their ‘best shot’ but all of their shots.” *Singh v. Superintending School Committee*, 593 F.Supp. 1315, 1318 (D. Me. 1984); *Ellis v. Jackson*, 319 F. Supp. 3d 23, 29 (D.D.C. 2018) (quoting *Singh*). Plaintiffs’ objection essentially seeks to relitigate their discovery dispute. *See Buchanan v. Consol. Stores Corp.*, 206 F.R.D. 123, 124 (D. Md. 2002) (“It is not the function of objections to discovery rulings to allow wholesale relitigation of issues resolved by the magistrate judge.”).

*Fourth*, the evidentiary value of the declaration is negligible, at best. The declaration, Doc. 120-3, contains conclusory hearsay, is vague, and ultimately contains no admissible evidence that would compel a different result than that reached by the Magistrate Judge. Mr. Williams fails to identify any particular person with whom he allegedly spoke, attributes no specific quotes to that unnamed individual, and fails to otherwise attribute any particular religious animosity by any current Commissioner to Plaintiffs or the administrative proceeding. For each of these reasons, the document is of no real evidentiary value.

Setting aside its evidentiary inadequacy, it further fails at the purpose for which it was likely intended—that is to satisfy the narrow, inapplicable exception to the *Morgan* doctrine found in *Overton Park*. As the Sixth Circuit has recognized, when applying *Overton Park*, a “plaintiff must show *specific facts* indicating that the challenged action was reached because of improper motives.” *Charter Twp. of Van Buren v. Adamkus*, 188 F.3d 506 (6th Cir. 1999) (emphasis added). In that case, the plaintiff attempted to use an isolated statement from an agency employee and an affidavit that asserted the challenged decision was reached because of improper motives. But this fell short of the *Overton Park* requirement. The affidavit was “conclusory,” and failed to offer specific facts showing an improper motive. The court held that “[s]uch bald assertions of bad faith are insufficient to require agency officials to submit to depositions.” *Id.* (citing *Friends of the Shawangunks, Inc., v. Watt*, 97 F.R.D. 663, 667-68 (N.D.N.Y. 1983)).

At bottom, the Williams affidavit contains no admissible evidence. But even if it is considered, it is insufficient to demonstrate that the Magistrate Judge’s decision was clearly erroneous or contrary to law. Like the affidavit in *Van Buren*, the Williams affidavit contains only an unattributed, conclusory allegation of improper motive. But what it fails to state, which

is required under *Overton Park*, are specific facts. Among other critical missing facts, the Williams affidavit does not identified a single fact as it relates to *this* case. It also does not identify the specific Commissioner to whom Williams allegedly spoke. Instead of supplying specific facts, as required under *Overton Park*, the affidavit appears intended only to generate mystery and intrigue. This is insufficient to justify the Plaintiffs' fishing expedition. And in any event, the Commission's Fed. R. Civ. P. 30(b)(6) designee will be prepared to discuss this conversation, to the extent it occurred at all and related to Plaintiffs, as well as all other third-party conversations that the Commissioners may have had regarding Plaintiffs. Plaintiffs' attempt to render inadequate the Commission's as yet untested Fed. R. Civ. P. 30(b)(6) designee should be rejected.

### CONCLUSION

Here, the Magistrate Judge properly determined that Plaintiffs are not entitled to depositions of individual Commissioners. This conclusion was neither clearly erroneous nor contrary to law and, accordingly, the Court should overrule Plaintiffs' objection.

Respectfully submitted this 25th day of February, 2019.

PHILIP J. WEISER  
Attorney General

*s/ Jacquelynn Rich Fredericks and Michael D.  
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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 **STATE OFFICIALS' RESPONSE TO PLAINTIFFS' OBJECTION [DOC. 120]** upon all counsel of record and parties who have appeared in this matter through ECF or as otherwise indicated below:

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**From:** [Grant Sullivan](#)  
**To:** "[Ryan Tucker](#)"  
**Subject:** RE: Masterpiece v Elenis - Discovery Schedule  
**Date:** Sunday, February 17, 2019 5:11:41 PM  
**Attachments:** [image001.png](#)

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Ryan,

We don't anticipate needing the full 14-day period to prepare our 30(b)(6) designee, but we won't know for sure until after we see your 30(b)(6) deposition notice with list of topics. Please send it over when you can and we'll let you know promptly.

Thanks,

Grant

**Grant T. Sullivan**

Assistant Solicitor General  
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**From:** Ryan Tucker [<mailto:rtucker@adfllegal.org>]

**Sent:** Saturday, February 16, 2019 6:43 AM

**To:** Grant Sullivan

**Subject:** RE: Masterpiece v Elenis - Discovery Schedule

Also, I'm assuming your side is agreeing to waive the 14 day requirement as well. Is that correct?

Thanks.

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**From:** Ryan Tucker

**Sent:** Friday, February 15, 2019 4:55 PM

**To:** Grant Sullivan

**Subject:** Re: Masterpiece v Elenis - Discovery Schedule

We're representing Mrs Phillips and Ms Eldrick so need to subpoena them. Thx

Sent from my iPhone

On Feb 15, 2019, at 4:01 PM, Grant Sullivan <[Grant.Sullivan@coag.gov](mailto:Grant.Sullivan@coag.gov)> wrote:

Ryan,

Thank you for waiving the 14-day requirement. Are you also able to waive personal service of deposition subpoenas for Mr. and Mrs. Phillips, and Ms. Eldrick?

On your request to depose Ms. Elenis, let us confer internally and then get back to you early next week.

Regarding not copying Ms. Scardina's counsel on scheduling emails, is there a legal basis you have for not including them? The State Officials are taking no position on



Ms. Scardina's request to intervene. Our concern is just a logistical one – if Ms. Scardina is permitted to intervene but her counsel has not been included on scheduling correspondence, the parties may have to scramble at the last second to revise the deposition schedule. If she is denied intervention, her counsel will obviously not have the right to attend the scheduled depositions. In light of that, does it make sense to at least copy them on scheduling emails for the time being?

Thanks in advance,

**Grant T. Sullivan**

Assistant Solicitor General  
Office of the Colorado Attorney General  
State Services Section  
Public Officials Unit  
1300 Broadway, 6<sup>th</sup> Floor  
Denver, Colorado 80203  
Direct: (720) 508-6349  
Email: [grant.sullivan@coag.gov](mailto:grant.sullivan@coag.gov)

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**From:** Ryan Tucker [<mailto:rtucker@adflegal.org>]  
**Sent:** Friday, February 15, 2019 1:35 PM  
**To:** Grant Sullivan  
**Subject:** Re: Masterpiece v Elenis - Discovery Schedule

Grant,

Let me check on those. And yes, we can waive the local rule requirement.

Also, we noticed that you identified Aubrey Elenis as a person who you intend to call at the preliminary injunction hearing. Do you object to us taking her deposition?

Lastly, with regard to the request by Autumn Scardina's counsel, we do not think it is appropriate to be looping them in on discovery scheduling unless it is for the specific scheduling of Scardina's deposition.

Thanks,

Ryan

Sent from my iPhone



Ryan Tucker  
Sr. Counsel  
+1 480 444 0020 (Office)  
480-444-0028 (Fax)  
[rtucker@ADFlegal.org](mailto:rtucker@ADFlegal.org)  
[www.ADFlegal.org](http://www.ADFlegal.org)

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On Feb 15, 2019, at 1:00 PM, Grant Sullivan <[Grant.Sullivan@coag.gov](mailto:Grant.Sullivan@coag.gov)> wrote:

Jim and Ryan,

We wanted to follow up on our call with Ryan yesterday regarding deposition scheduling. Regarding Jack Phillips' deposition, we have

good availability on February 27, 28 and March 1. Please let us know your availability.

We also intend to take the deposition of Autumn Scardina. Our understanding is that John McHugh, copied here, is checking on his and Ms. Scardina's availability for the weeks of February 25 and March 4.

We may also want to take the depositions of Debra Phillips and Lisa Eldrick, although it might be the case that Mr. Phillips' and Ms. Scardina's deposition testimony renders their depositions unnecessary.

Last, local rule 30.1 in this district requires that notices of deposition be served 14 days in advance of the deposition. Jim and John, please let us know this afternoon if your clients are willing to waive this requirement. If not, we can have notices served later this afternoon and then work cooperatively with you to modify the actual deposition dates to fit scheduling needs. Please also let us know if you are authorized to waive service of deposition subpoenas for your clients. If yes, we'll have waivers prepared and sent to you.

Thank you in advance,

**Grant T. Sullivan**

Assistant Solicitor General  
Office of the Colorado Attorney General  
State Services Section  
Public Officials Unit  
1300 Broadway, 6<sup>th</sup> Floor  
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**From:** McHugh, John [<mailto:jmchugh@rplaw.com>]

**Sent:** Thursday, February 14, 2019 2:43 PM

**To:** 'Jon Scruggs'; David Cortman; Jake Warner; Jim Campbell; Kate Anderson; Kristen Waggoner; '[nicollem@comcast.net](mailto:nicollem@comcast.net)'; Roger Brooks; Grant Sullivan; Jacquelynn Rich Fredericks; LeeAnn Morrill; Michael McMaster; Vincent Morscher

**Cc:** Paula Greisen

**Subject:** Masterpiece v Elenis - Discovery Schedule  
Counsel,

Assuming there is a chance that our motion to intervene is granted, please include Paula and me on any discussions regarding discovery scheduling in advance of the preliminary injunction hearing.

Thanks,

John

JOHN McHUGH

REILLY POZNER LLP | WWW.RPLAW.COM  
1700 LINCOLN STREET, SUITE 3400  
DENVER, COLORADO 80203  
MAIN: 303.893.6100 | FAX: 303.893.6110

[JMCHUGH@RPLAW.COM](mailto:jmchugh@rplaw.com)

---

**From:** Jon Scruggs [<mailto:jscruggs@adflegal.org>]  
**Sent:** Tuesday, February 05, 2019 6:28 PM  
**To:** McHugh, John; David Cortman; Jake Warner; Jim Campbell; Kate Anderson; Kristen Waggoner; '[nicollem@comcast.net](mailto:nicollem@comcast.net)'; Roger Brooks; Grant Sullivan; '[Jacquelynn.RichFredericks@coag.gov](mailto:Jacquelynn.RichFredericks@coag.gov)'; '[leeann.morrill@coag.gov](mailto:leeann.morrill@coag.gov)'; '[michael.mcmaster@coag.gov](mailto:michael.mcmaster@coag.gov)'; '[Vincent.Morscher@coag.gov](mailto:Vincent.Morscher@coag.gov)'  
**Cc:** Paula Greisen  
**Subject:** RE: Masterpiece v Elenis - Motion to Intervene  
Counsel, thank you for reaching out. With respect to your request, Plaintiffs will oppose your motion to intervene.  
Jonathan Scruggs

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Jon Scruggs  
Sr. Counsel, Director of Center for Conscience Initiatives  
+1 480 444 0020 (Office)  
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---

**From:** McHugh, John [<mailto:jmchugh@rplaw.com>]  
**Sent:** Monday, February 04, 2019 4:30 PM  
**To:** David Cortman <[dcortman@adflegal.org](mailto:dcortman@adflegal.org)>; Jake Warner <[jwarner@adflegal.org](mailto:jwarner@adflegal.org)>; Jim Campbell <[jcampbell@adflegal.org](mailto:jcampbell@adflegal.org)>; Jon Scruggs <[jscruggs@adflegal.org](mailto:jscruggs@adflegal.org)>; Kate Anderson <[kanderson@adflegal.org](mailto:kanderson@adflegal.org)>; Kristen Waggoner <[kwaggoner@adflegal.org](mailto:kwaggoner@adflegal.org)>; '[nicollem@comcast.net](mailto:nicollem@comcast.net)' <[nicollem@comcast.net](mailto:nicollem@comcast.net)>; Roger Brooks <[rbrooks@adflegal.org](mailto:rbrooks@adflegal.org)>; Grant Sullivan <[Grant.Sullivan@coag.gov](mailto:Grant.Sullivan@coag.gov)>; '[Jacquelynn.RichFredericks@coag.gov](mailto:Jacquelynn.RichFredericks@coag.gov)' <[Jacquelynn.RichFredericks@coag.gov](mailto:Jacquelynn.RichFredericks@coag.gov)>; '[leeann.morrill@coag.gov](mailto:leeann.morrill@coag.gov)' <[leeann.morrill@coag.gov](mailto:leeann.morrill@coag.gov)>; '[michael.mcmaster@coag.gov](mailto:michael.mcmaster@coag.gov)' <[michael.mcmaster@coag.gov](mailto:michael.mcmaster@coag.gov)>; '[Vincent.Morscher@coag.gov](mailto:Vincent.Morscher@coag.gov)' <[Vincent.Morscher@coag.gov](mailto:Vincent.Morscher@coag.gov)>  
**Cc:** Paula Greisen <[greisen@kinggreisen.com](mailto:greisen@kinggreisen.com)>  
**Subject:** Masterpiece v Elenis - Motion to Intervene  
Counsel,  
Paula and I represent Autumn Scardina. My client intends to move to intervene in the federal action for, at the present, the limited purpose of the preliminary injunction motion filed by plaintiffs.  
Please advise if you will oppose.  
Thanks,  
John  
JOHN McHUGH

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STATE OF COLORADO  
DEPARTMENT OF LAW

State Services Section

February 21, 2019

Via Email Only: [rtucker@ADFlegal.org](mailto:rtucker@ADFlegal.org)  
Ryan Tucker  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, AZ 85260

RE: *Masterpiece Cakeshop, Inc., et al. v. Elenis, et al.*, No. 18-cv-02074-WYD-STV  
(D. Colo.) – Rule 30(b)(6) deposition of the Colorado Civil Rights Commission

Dear Ryan:

We write to again follow up regarding the scheduling of a Rule 30(b)(6) deposition of the Colorado Civil Rights Commission in this case. As you know, Magistrate Judge Varholak has authorized only a Rule 30(b)(6) deposition of the Commission, not depositions of the individual commissioners. And although Plaintiffs recently sought to stay expedited discovery while they filed an objection with Judge Daniel, no stay has been granted. Under the local rules, the filing of an objection to a Magistrate Judge's decision does not stay that decision. D.C.COLO.LCivR 30.2(b). Thus, given the short window remaining before the upcoming March 14-15, 2019 preliminary injunction hearing, the parties should continue with expedited discovery pending a ruling from Judge Daniel.

Consistent with the good-faith conferral requirement in the local rules, *see* D.C.COLO.LCivR 30.1, we initially conferred with you regarding deposition scheduling by telephone on February 14, 2019. You did not provide any availability for depositions at that time. We followed up with you by email on February 15, 2019, again requesting deposition availability. Although you stated you would "check" on availability, you never followed up to provide availability. Finally, on February 17, 2019, in response to your request that the State Officials waive the 14-day advance notice requirement for deposition notices, we requested that you first provide a Rule 30(b)(6) deposition notice with an accompanying list of deposition topics so that our designee could determine how much preparation time would be necessary. To date, you have not provided us with a Rule 30(b)(6) deposition notice that contains a list of deposition topics.

Your delay in providing a Rule 30(b)(6) deposition notice is prejudicing the ability of the Commission's designee to prepare and is likewise jeopardizing the March 14-15, 2019 preliminary injunction hearing date. As you know, the



Page 2

Commission has not yet agreed to waive the 14-day advance notice requirement for depositions. *See* D.C.COLO.LCivR 30.1. The reason, of course, is that preparing a Rule 30(b)(6) designee takes time; the amount of preparation that is necessary depends greatly on the list of deposition topics contained in the notice of deposition. *See* Fed. R. Civ. P. 30(b)(6) (stating the notice “must describe with reasonable particularity the matters for examination”).

Arguably, Plaintiffs have already waived their right to seek a Rule 30(b)(6) deposition of the Commission during this expedited discovery period. As stated, you have not complied with the 14-day advance notice requirement and the parties have agreed to extend the expedited discovery window only through March 5, 2019. Thus, the deadline for Plaintiffs to notice a deposition was two days ago—February 19, 2019. Nonetheless, the State Officials are willing to work with you in good faith to immediately schedule a Rule 30(b)(6) deposition of the Commission.

To that end, we request that you provide us with a Rule 30(b)(6) deposition notice, with a list of deposition topics that complies with Magistrate Judge Varholak’s ruling, no later than the close of business tomorrow, February 22, 2019. In exchange, we will agree to make the Commission’s designee available for deposition during the week of March 4, 2019, at a time that is mutually convenient for all counsel. If you choose not to provide us with a Rule 30(b)(6) deposition notice by tomorrow, we may seek an order that precludes Plaintiffs from taking any deposition of the Commission in advance of the preliminary injunction hearing. Please consider this letter our conferral attempt on such a motion, as required by D.C.COLO.LCivR 7.1(a), and provide us with your position.

Last, we are in receipt of your email from this morning regarding the scheduling of depositions for other witnesses. Although I had left you a voicemail earlier this morning to follow up on those issues, we will respond to that email shortly in writing under separate cover. Please contact us with any questions.

Sincerely,

FOR THE ATTORNEY GENERAL



GRANT T. SULLIVAN  
Assistant Solicitor General  
State Services Section  
Public Officials Unit  
(720) 508-6349  
Email: grant.sullivan@coag.gov

Page 3

cc:

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