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

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,	)	Civil Action No.: 9:18-cv-80771-RLR
Plaintiffs,	)	
v.	)	
CITY OF BOCA RATON, FLORIDA, and COUNTY OF PALM BEACH, FLORIDA,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CITY OF BOCA RATON'S MOTION FOR EXTENSION OF TIME AND FOR PROTECTIVE ORDER

The Motion for Extension of Time and for Protective Order (dkt. 30) ("Discovery Motion") filed by Defendant City of Boca Raton ("City") violates this Court's Orders, is untimely, is otherwise without merit, and should be denied for any one of several separate and independent reasons:

1. The Discovery Motion Violates this Court's Standing Order on Discovery Disputes.

A Standing Order outlining detailed and specific "Procedures for Discovery Disputes" has been entered in this case (dkt. 12) ("Standing Order"), which requires, among other things, an in-person or telephonic meet and confer between counsel, and, more importantly, precludes the filing of any discovery motion until the complaining party informally advises the Court of the dispute, requests a hearing, files a memorandum, and the Court subsequently authorizes the motion. (*Id*. at 1-2). The City was keenly aware of these requirements, because it was copied on each step of this procedure that Plaintiffs followed with the other Defendant, Palm Beach County ("County"), on the same issues, in just the prior week. The City, however, decided to create its own rules, and filed its Discovery Motion without an in-person or telephonic conference with the Plaintiffs,[1] and without even seeking, much less obtaining, authorization from the Court.

[1] The City did communicate with Plaintiffs via email.

The City comes to this Court asking it to penalize Plaintiffs for a four-day delay, by adopting and strictly enforcing a hyper-technical reading of its Orders and the applicable rules. The City should be made to live by its own standards.

2. The Discovery Motion Is Untimely.

The City's Discovery Motion raises **exactly the same** objections raised by the County in connection with Plaintiffs' Second Set of Discovery Requests and Amended Deposition Notice – namely that they were served four days late and thus the discovery sought cannot be had prior to the Preliminary Injunction Hearing. In the week prior to filing its Discovery Motion, the City's three counsel and their two assistants were all copied on each of the following **twelve** communications and filings: 1) The County's July 23, 2018 email objection to the discovery requests as untimely; 2) Plaintiffs' response, requesting compliance or a telephonic meet and confer; 3) the County's response inviting a telephonic meet and confer; 4) Plaintiffs' follow-up email after the telephonic meet and confer, making another attempt to resolve the issue and indicating that a letter to the Court would be sent the following day to request a hearing if the issue could not be resolved; 5) the County's response confirming the County would not respond to the discovery; 6) Plaintiffs' final email to the parties, following another telephonic meet and confer, confirming the County's position and indicating that a request for hearing will be sent to the Court; 7) Plaintiffs' detailed email to the Court (Judge Reinhart) requesting a hearing and providing a synopsis of the dispute; 8) Judge Reinhart's clerk's response providing available dates for a hearing; 9) Plaintiffs' response selecting a hearing date; 10) the Court's Notice of Hearing; 11) Plaintiffs' Discovery Memorandum (dkt. 27); and 12) the County's Opposition (dkt. 28).

Rather than raising its objections and participating in the multiple meet and confers, the City did – and said – **nothing**. The City did not participate in the meet and confers between Plaintiffs and the County. Moreover, the City did not file any response to Plaintiffs' Discovery Memorandum, and certainly did not file a response within "24 hours of receiving" it. (Standing Order at 2). These failures might be forgivable were the City not attempting to now raise the same exact objections, and were the City not asking this Court for strict application of deadlines in the City's effort to capitalize on a four-day delay.

3. The Discovery Sought Is Legitimate, Modest and Critical to the Merits, and thus to the Preliminary Injunction, in this Case.

The Amended Deposition Notice adds **one** substantive new topic to the prior list, namely the extent to which the City regulates other clinical practice methods and other professionals or professions besides Plaintiffs' SOCE counseling. (Dkt. 30-2, page 4, Topic 13).[2] Similarly, the Second Set of Discovery Requests comprises: 1) four interrogatories and four requests for production going to **the same one topic of local regulation** (Dkt. 30-1, page 2, Interrogatories 10-13; *id*. at pp. 4-5, Document Requests 25-28); 2) one interrogatory asking the City to identify the "overwhelming research" **that the City itself references in its Ordinance**; and 3) eleven Requests for Production asking the City to produce any of that "overwhelming research" **that happens to be in its custody, possession or control**. (*Id*. at pp. 5-8, Document Requests 29-39). That's it.

The question of local regulation is critical to the merits of this case, because Defendants contend that they have the authority at the local level to regulate mental health professionals for the welfare and safety of their citizens, while Plaintiffs contend that function belongs solely to the state government. If it turns out that the regulations at issue in this lawsuit are the first and only ones of their kind ever enacted by Defendants, their argument will be laid bare. In the same vein, the "overwhelming research" on which Defendants purportedly relied to enact the challenged ordinances is important to the question of Defendants' asserted need for these regulations, and Defendants' claimed success (or, perhaps, abject failure) in tailoring the challenged ordinances to that purported need.

Importantly, because the first of the familiar four factors to be considered by the Court on Plaintiffs' motion for preliminary injunction is Plaintiffs' likelihood of success on the merits, *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc), the discovery sought is critical not only to the merits, but also to the preliminary injunction. The City's contention that the discovery sought is "unrelated" to the preliminary injunction is thus plainly wrong. (Dkt. 50, p. 2, ¶ 6). The merits and preliminary injunction issues in this case are inextricably intertwined, and so is the legitimate discovery sought by Plaintiffs.

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[2] Because Plaintiffs desire to streamline depositions and depose the City only once, the Amended Notice also added some generic, catch-all topics, such as the factual matters disclosed by the City in its Motion to Dismiss, or in its opposition to the Preliminary Injunction Motion (dkt. 30-2, page 3, Topic 9).

4. The City Has Not Identified, and Cannot Identify, Any Prejudice from the Four-Day Delay.

The only "prejudice" the City can assert is that Plaintiffs' Second Set of Discovery Requests, and the Amended Deposition Notice, will require the City to do more work. That kind of "prejudice," however, is self-evident from **any** discovery request. The City does not say how much more work it would be required to do, nor does the City explain why it would take its counsel's **66-lawyer-firm over two additional months** (on top of the one month already available) to do that work.

The City's silence is not accidental. The City cannot reasonably contend that preparing its Rule 30(b)(6) witness to testify on **one** additional substantive topic, related to the City's defense, is going to pose an insurmountable obstacle, when, even with the four-day delay, **the City still has six weeks to prepare that witness**. The City also cannot reasonably contend that delaying this one topic for two more months, and thus needlessly forcing a second deposition of the City, would take **less** time and resources, or would be more manageable.

The City also cannot reasonably contend that responding to five interrogatories and fifteen document requests cannot be done within the 30 days permitted by the civil rules, and requires instead three months. In preparing its witness to testify on the topic of local regulation, the City would already have to pull all the relevant regulations (assuming any exist) and answer the interrogatory questions. Providing that information to Plaintiffs in advance of the City's deposition, so that Plaintiffs can be reasonably prepared, would take only a negligible amount of additional time and effort. Similarly, the City presumably knows which studies form the "overwhelming research" referred to in the ordinance, and it would take very little effort for the City to turn over to Plaintiffs that research which the City presumably already has in its custody, possession or control (assuming any exists).

In sum, the City has not identified, and cannot identify, any prejudice from the four-day delay in receiving Plaintiffs' Second Set of Discovery Requests and Amended Deposition Notice. The City does not suggest that the discovery sought by Plaintiffs on July 21 would have been overly burdensome or illegitimate if sought four days earlier on July 17, nor does the City contend that it could not have timely answered the additional discovery had it been served on July 17. And yet, if the discovery had been served on July 17, the City would have had only **24 days** to respond. (Dkt. 25, p. 1). Plaintiffs' four-day delay has resulted in the City having **30 days** to respond, as

provided by Civil Rules 33 and 34. Plaintiffs' four-day delay has thus led to a six-day **increase** in the City's response time. This is the exact opposite of prejudice.

The City is objecting merely for the sake of objecting, in an attempt to capitalize on Plaintiffs' different reading of the scheduling orders and applicable rules. The Court should reject this tactic.

5. Even If Plaintiffs' Second Set of Discovery Requests and Amended Deposition Notice Were "Late," the Non-Prejudicial Delay is Excusable.

Plaintiffs remain in their belief that their interpretation of the Civil Rules, the General Discovery Order (dkt. 19) and the Preliminary Injunction Discovery Order (dkt. 25) is correct, and that this Court did not intend the latter to completely obviate and supplant the former, nor to put all other discovery on hold until the preliminary injunction motion is decided. Plaintiffs' reasoning is spelled out in their Discovery Memorandum for August 2, 2018 Hearing (dkt. 27) ("Discovery Memorandum").

If Plaintiffs are wrong, then their non-prejudicial four-day delay should be excused. Plaintiffs' reading of the Order and rules is reasonable, even if ultimately wrong. In the absence of any warning in the PI Discovery Order that no other discovery could be had, Plaintiffs' belief that they could still propound legitimate and modest discovery requests under the Civil Rules, and receive responses under the timeline imposed by the Civil Rules, was reasonable.

Moreover, Plaintiffs were working under a truncated schedule to propound their First Set of Discovery Requests on July 17, 2018. The City had just served its Initial Disclosures on July 13, 2017. Those disclosures were worthless, because the City chose not to identify **a single potential witness with knowledge of its claims or defenses**, taking instead the curious position that "City does not believe that any witnesses are necessary or appropriate with regard to the claims currently asserted in the Complaint." (City's Initial Disclosures, attached hereto as **Exhibit A**). The City also failed to identify, much less provide, any of the "overwhelming research" referred to in its Ordinance, on which it purportedly relied in passing the Ordinance. (*Id.*)

Stymied by the City's non-disclosing Initial "Disclosures," juggling several other tight deadlines in other cases, and being unable to communicate effectively with the Plaintiffs because one was out-of-state on vacation and one was moving offices, Plaintiffs' counsel inadvertently omitted a handful of requests and topics from the set served on July 17. Counsel rectified the situation four days later, and made it very clear that Plaintiffs were prepared to forego the 24-day

response time provided by the PI Discovery Order, and settle for the 30-day period provided by the Civil Rules.

Plaintiffs respectfully suggest that this is not grounds for the City (and the County) to now deprive Plaintiffs of critical discovery and this Court of an opportunity to decide this case (including the Preliminary Injunction) on the merits. If Plaintiffs were incorrect in their reading of this Court's Orders and applicable rules, then Plaintiffs ask the Court to excuse their four-day delay and to require the City to respond to their discovery requests as provided by the Civil Rules.

6. Plaintiffs Incorporate by Reference the Additional Grounds Previously Identified.

In their Discovery Memorandum Plaintiffs identified several additional grounds as to why the County's (and now the City's identical) objection lack merit. (Dkt. 27 at 2-3). Rather than repeating them here, Plaintiffs incorporate them by reference, as they are equally applicable.

CONCLUSION

The undersigned counsel for Plaintiffs has an emergency root canal procedure on the morning of the August 2, 2018 hearing on the City's and County's objections to Plaintiffs' discovery. As much as the undersigned dreads going through that exercise, at this point it will actually be a welcomed relief from the torturous discovery tactics taking shape in this litigation. Discovery should not be like pulling teeth, and the weighty constitutional issues in this case should be decided based upon their merits, not discovery games. The Court should therefore deny the City's motion and require the City to respond fully to all requests.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August 2018, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Horatio G. Mihet
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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:18-CV-80771-RLR

ROBERT W. OTTO, PH.D. LMFT,
individually and on behalf of his patients,
JULIE H. HAMILTON, PH.D., LMFT.
individually and on behalf of her patients,

Plaintiffs,

vs.

CITY OF BOCA RATON, FLORIDA,
and COUNTY OF PALM BEACH,
FLORIDA

Defendants.

_____/

CITY OF BOCA RATON'S INITIAL DISCLOSURES

Defendant, City of Boca Raton ("City"), by and through undersigned counsel, pursuant to Rule 26(a)(1)(A), Federal Rules of Civil Procedure, serves its Initial Disclosures and states as follows:

Rule 26(a)(1)(A)(i) – WITNESS LIST

The City does not believe that any witnesses are necessary or appropriate with regard to the claims currently asserted in the Complaint. The lawfulness of the challenged ordinance and alleged acts, practices and policies of the City can be determined from the face of Ordinance No. 5407 ("Ordinance") itself. Moreover, witness testimony, either at trial or in discovery, would likely violate the legislative privilege, the deliberative process privilege, and the attorney-client privilege, amongst others.

Rule 26(a)(1)(A)(ii) – DOCUMENT LIST

1) Documents related to the Ordinance, including the Ordinance itself, any drafts of the Ordinance, staff reports created in connection with the Ordinance (and documents cited therein), the minutes and recordings of the City Council's meetings in which the Ordinance was considered, and any and all City files related to the Ordinance or with regard to the claims asserted in the Complaint.

2) The Model Conversion Therapy Ban Ordinance by the Palm Beach County Human Rights Council, and any and all scientific articles and studies cited therein.

Rule 26(a)(1)(A)(iii) – DAMAGES

The City has not asserted a claim for damages.

Rule 26(a)(1)(A)(iv) – INSURANCE

The City is self-insured. However, the City does have an excess insurance policy, which may or may not provide coverage for the claims asserted herein. A copy of the policy is available for inspection and copying.

The City reserves the right to supplement these Initial Disclosures as necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail on July 13, 2018 on all counsel of record on the attached Service List.

Respectfully submitted,

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SERVICE LIST

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-CIV-80771-RLR

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