

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 18-523 JFW(JCx) Date December 11, 2018

Title Andrew Mason Dvash-Banks, et al. v. the United States Department of State, et al.

Present: The Honorable Jacqueline Chooljian, United States Magistrate Judge

Kerri Hays

CS 12-11-18

None

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorney Present for Defendants:

Alexa M. Lawsom-Remer
Theodore Edelman
Rebekah T. Raybuck

Lisa Zeidner Marcus

**Proceedings: HEARING AND ORDERS ON PLAINTIFFS' MOTION TO COMPEL
(DOCKET NO. 54)**

Case called. Counsel stated their appearances. The Court heard argument from counsel. Plaintiffs withdrew portions of the Motion to Compel as detailed below. For reasons explained on the record and as detailed below, the Court granted in part and denied in part without prejudice Plaintiffs' Motion to Compel. The Court set further telephonic status conferences for discovery as detailed below and directed Defendants' counsel to provide a proposed stipulated protective order to Plaintiffs' counsel by not later **December 12, 2018**.

1. Plaintiffs withdrew and/or the Court denied as moot:

(a) the portion of the Motion to Compel which sought an order compelling Defendants to produce Larilyn Reffett, Margaret Ramsay, and Ann Marie Warmenhoven for deposition as (i) the depositions of the first two witnesses have since been taken; and (ii) the third witness is currently on duty outside of North America and Defendants' counsel has represented that Plaintiffs' counsel would be notified if such witness returns to North America prior to the discovery cut-off deadline;

(b) the portion of the Motion to Compel which sought an order compelling Defendants to produce Karen Christensen and Brian Egan for deposition, in light of the Court's rulings relative to the deposition of Defendants' Fed. R. Civ. P. 30(b)(6) witness(es) detailed below;

(c) the portion of the Motion to Compel which sought an order compelling Defendants to designate a Fed. R. Civ. P. 30(b)(6) witness/witnesses to testify regarding Topic Nos. 10, 11, 16, 21 and 22 in Plaintiffs' deposition notice; and

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(d) the portion of the Motion to Compel which sought an order compelling Defendants to provide supplemental responses to Interrogatory Nos. 1-20, in light of the Court's rulings relative to the deposition of Defendants' Fed. R. Civ. P. 30(b)(6) witness(es) detailed below.

2. As to the portion of the Motion to Compel which sought an order compelling Defendants to produce Frankie Terri Day and Carlos Hernandez for deposition, the Court ruled:

(a) as to Frankie Terri Day – Defendants' former employee who has authorized Defendants' counsel to accept service of a subpoena – Plaintiffs shall renotece/resubpoena such deposition to take place on a date **not later than December 25, 2018** and Defendants shall produce such witness and such witness is ordered to appear for her deposition as renoteced/resubpoenaed; and

(b) as to Carlos Hernandez, absent Plaintiffs' notification to Defendants that Plaintiffs' withdraw their request to depose such witness, Plaintiffs shall renotece such deposition to take place on a date **not later than the discovery cut-off deadline** and Defendants shall produce such witness and such witness is ordered to appear for his deposition as renoteced.

3. As to the portion of the Motion to Compel which sought an order compelling Defendants to designate a Fed. R. Civ. P. 30(b)(6) witness/witnesses to testify regarding the remaining topics in Plaintiffs' deposition notice (Topic Nos. 1-9, 12-15 and 17-20), the Court:

(a) granted the Motion to Compel as to Topic No. 1;

(b) narrowed Topic No. 2 to call for testimony regarding (i) any and all non-attorney-client privileged/work product written communications concerning any request or application for a Consular Report of Birth Abroad ("CRBA") and U.S. passport for Plaintiff E.J.D.-B. (the "Minor"), including any refusal or denial of any such application(s); (ii) any and all non-attorney-client privileged/work product oral communications relating to the consideration and adjudication of any request or application for a CRBA and U.S. passport for the Minor, including any refusal or denial of any such application(s); and (iii) any and all non-attorney-client privileged/work product oral communications relating to the Congressional inquiry concerning any request or application for a CRBA and U.S. passport for the Minor, including any refusal or denial of any such application(s);

(c) narrowed Topic No. 3 to call for testimony regarding the specified topic for the year 2017 and the current date;

(d) granted the Motion to Compel as to Topic No. 4;

(e) deferred ruling on the Motion to Compel as to Topic No. 5 in light of the parties' expressed desire further to confer regarding such topic;

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(f) narrowed Topic No. 6 in the manner specified in Defendants' counsel's November 27, 2018 letter attached as Exhibit J to Defendants' counsel's declaration in support of its Supplemental Memorandum (Docket No. 56-3) and to 2017 and the current date;

(g) narrowed Topic No. 7 in the manner specified in Defendants' counsel's above-referenced November 27, 2018 letter (Docket No. 56-3) and to the following time frames: January 1, 2015 to June 2, 2017; the six-month periods following each of United States v. Windsor, 570 U.S. 744 (2013), Solis-Espinoza v. Gonzales, 401 F.3d 1090 (9th Cir. 2005), and Scales v. INS, 232 F.3d 1159 (9th Cir. 2000); 2017; and the current date;

(h) granted the Motion to Compel as to Topic No. 8 as narrowed by Plaintiffs to call for testimony regarding any circumstances under which the State Department treats the children of men in same-sex marriages as children born in wedlock;

(i) granted the Motion to Compel as to Topic Nos. 9 and 12-14 and acknowledged that, at least as to Topic Nos. 13-14, Defendants retained their right to assert attorney-client privilege/work product objections during the deposition;

(j) narrowed Topic No. 15 to call for testimony for the time period of January 1, 2015 to June 2, 2017 and the current date and otherwise denied the Motion to Compel as moot in light of the parties' agreement relative to the appropriate remaining scope of such topic;

(k) narrowed Topic Nos. 17-18 to call for testimony regarding the available fields of pertinent information in Defendants' automated database(s), reasonable inquiries/efforts to ascertain the information called for by these topics, and the results of such inquiries/efforts;

(l) narrowed Topic Nos. 19-20 to call for testimony regarding the specified topics for the time period of January 1, 2015 to June 2, 2017 and the current date; and

(m) directed (i) Defendants to notify Plaintiffs of the identity/identities of the designated Fed. R. Civ. P. 30(b)(6) witness/witnesses and, if more than one witness, the topics each such witness is designated to testify about **by not later than December 14, 2018**; (ii) Plaintiffs to renotice such deposition(s) to take place on a date **not later than the December 21, 2018**; and (iii) Defendants to produce a witness/witnesses to appear for such renoted deposition(s) to testify regarding the topics as to which the Court has granted the Motion to Compel.

4. As to the portion of the Motion to Compel which sought an order compelling Defendants to produce additional documents responsive to Request for Production ("RFP") Nos. 1-3, 5-8 and 12-23, the Court:

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(a) narrowed RFP No. 1 and directed Defendants to produce, for the period of 2012 to the present, documents sufficient to reflect the policies¹ of the State Department for applying Section 301(g) and Section 309 to persons who claim to have acquired United States citizenship under those statutory provisions, the reasons/rationale for the same, and internal objections/opposition to the same;

(b) narrowed RFP No. 2 and directed Defendants to produce, for the period of 2012 to the present, documents sufficient to reflect any direction, agreement or disagreement between core policymakers for the specified CIS units and the State Department concerning policies for applying Section 309, rather than Section 301(g), to any person born outside of the United States to married parents (one of whom is a United States citizen) if the person is not biologically related to the United States citizen parent, and the basis therefor;

(c) narrowed RFP No. 3 and directed Defendants to produce, for the six-month period following each of the specified court decisions, non-attorney-client privileged/work product documents sufficient to reflect whether, and the degree to which State Department core policymakers considered the impact/effect of the respective specified court decisions on applications for a CRBA, United States passport or Certificate of Citizenship by Plaintiffs or any other person (i) born outside the United States (ii) who asserts he or she is the child of a United States citizen; (iii) whose United States citizen parent is married to a foreign national; and (iv) who does not have a biological relationship to his/her United States citizen parent, and any directions or guidance issued relating to the same;

(d) directed Defendants to produce to Plaintiffs the documents Defendants previously represented to Plaintiffs that they would produce in response to RFP No. 5 (see Joint Stipulation at 46 [Docket No. 54-1]), and otherwise denied the Motion to Compel as to RFP No. 5;

(e) directed Defendants to produce to Plaintiffs the documents Defendants previously represented to Plaintiffs that they would produce in response to RFP Nos. 6-8 (see Joint Stipulation at 50, 55, 58 [Docket No. 54-1]), directed Defendants to also produce, as to RFP No. 7, all documents and communications concerning any Congressional inquiry about applications for a CRBA, United States passport or Permanent Resident Card made, submitted, or sought on behalf of the Minor and his brother, and otherwise denied the Motion to Compel as to RFP Nos. 6-8;

(f) narrowed RFP Nos. 12-15 for the time being and directed Defendants to produce documents sufficient to identify the fields of pertinent information available in Defendants' automated databases;

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¹The Court indicated that it was using the term "policy"/"policies" as shorthand for "protocols, procedures, practices and policies".

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(g) narrowed RFP No. 16 and directed Defendants to produce, for the period of 2012 to the present, documents sufficient to show all policies reflecting all evidentiary requirements to establish United States citizenship under Section 301(g) or Section 309, including when genetic testing will or will not be requested;

(h) narrowed RFP No. 17 and directed Defendants to produce, for the period of 2017 to the present, documents sufficient to reflect the State Department's interests or concerns concerning decisions not to treat as a United States citizen a child born outside of the United States to a married United States citizen who is not the child's biological parent but who is listed as a parent on the child's birth certificate;

(i) narrowed RFP No. 18 and directed Defendants to produce (i) all versions of the FAM (or equivalent or related documents) that define "in wedlock" and "out of wedlock," or any other term Defendants believe has the same or a similar meaning as those terms, for purposes of applying Section 301(g) or Section 309; and (ii) documents, for the period of 2012 to the present, sufficient to reflect decisions or discussions of how to define those terms (including any legal and policy support or justification considered, used, or relied upon in deciding upon such definitions) by State Department core policymakers and by the following four employees/former employees while they were assigned to the U.S. Consulate/Embassy in Toronto: Frankie Terri Day, Larilyn Reffett, Margaret Ramsay and Ann Marie Warmenhoven;

(j) narrowed RFP No. 19 and directed Defendants to produce, for the period of 2012 to the present, documents sufficient to reflect the State Department's definitions/policies regarding the definitions of the specified terms;

(k) narrowed RFP No. 20 and directed Defendants to produce documents sufficient to reflect any State Department policy in effect in 2017 having the purpose or effect of preventing discrimination based on sexual orientation in the provision of consular or passport services, or adjudication with respect to persons claiming to have acquired United States citizenship under Section 301(g) and Section 309;

(l) narrowed RFP No. 21 and directed Defendants to produce documents sufficient to reflect training/instruction concerning how to interact with gay, lesbian and/or other LGBT individuals or same-sex couples that was given from 2012 to 2017 to the following four employees/former employees who were assigned to the U.S. Consulate/Embassy in Toronto in 2017: Frankie Terri Day, Larilyn Reffett, Margaret Ramsay and Ann Marie Warmenhoven;

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(m) narrowed RFP No. 22 and directed Defendants to produce documents sufficient to reflect training/instruction concerning circumstances in which inquiry should be made about the biological and/or gestational relationships between married couples (one of whom is a United States citizen) and their children when such married couples are applying for CRBAs or United States passports on behalf of their children born outside the United States that was given from 2012 to 2017 to the following four employees/former employees who were assigned to the U.S. Consulate/Embassy in Toronto in 2017: Frankie Terri Day, Larilyn Reffett, Margaret Ramsay and Ann Marie Warmenhoven;

(n) narrowed RFP No. 23 and directed Defendants to produce documents sufficient to reflect training/instruction concerning requests or requirements for DNA testing to establish biological relationships of married couples (one of whom is a United States citizen) and their children when such married couples are applying for CRBAs or United States passports on behalf of their children born outside the United States that was given from 2012 to 2017 to the following four employees/former employees who were assigned to the U.S. Consulate/Embassy in Toronto in 2017: Frankie Terri Day, Larilyn Reffett, Margaret Ramsay and Ann Marie Warmenhoven; and

(o) directed Defendants to produce to Plaintiffs existing non-attorney-client privileged/work product documents in their possession, custody or control called for by the Court's orders and the documents Defendants previously represented to Plaintiffs that they would produce by **not later than December 17, 2018**, absent further order of the Court.

5. The Court set further telephonic status conferences on the dates/times below, subject to such conferences being vacated if Plaintiffs' and Defendants' counsel both notify the Clerk that either such conference is unnecessary:

- (a) **December 14, 2018 at 8:00 a.m.**
- (b) **December 19, 2018 at 2:30 p.m.**

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