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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

STATE OF CALIFORNIA,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO VACATE AMENDED ORDER ON JOINT STIPULATION TO MODIFY CASE SCHEDULE (ECF NO. 145)

Hearing
Date: June 3, 2019
Time: 9:00 a.m.
Courtroom: 1
Judge: Hon. Jesus G. Bernal

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INTRODUCTION

In their opposition ("Opposition") to Plaintiffs' motion to vacate (the "Motion") Defendants mischaracterize the history of this case and the parties' previous discussions regarding efficient litigation of the pending challenges to the government's unconstitutional ban of transgender individuals from military service (the "ban"), and seek relief not properly before this Court.

At Defendants' request, the parties entered into a cross-use agreement with the other cases seeking to overturn the ban in order to avoid burdening Defendants with duplicative discovery and allow the parties to share discovery and document productions. In line with those discussions, Plaintiffs refrained from propounding additional discovery requests until they had reviewed the responses and documents produced in the other pending actions. Now, Defendants claim that Plaintiffs "neglected" their duties and "sat on their rights." (Opp. at 3, 6.) Not so. Plaintiffs have acted in good faith and attempted to work cooperatively with Defendants.

Indeed, in the prior discussions regarding an appropriate case schedule, it was Defendants who raised the idea of vacating the case schedule here as they had done in the *Karnoski* case. But because all parties anticipated that the Ninth Circuit would rule on the pending appeals in the near term, the parties agreed to a set schedule. Because the appeals remain pending and Defendants have continued broadly to assert privilege, the case schedule needs to be revisited. And, in order to avoid coming back multiple times, it only makes sense to vacate the current schedule and return to discuss an appropriate schedule after the Ninth Circuit rules.

Defendants request in their Opposition that the entire case be stayed if any relief is to be granted. First, this request is not properly before this Court. Second, Defendants do not and cannot satisfy the standard for imposing a complete stay.

For the reasons set forth in the Motion and below, Plaintiffs respectfully request that the current case schedule be vacated and that a further scheduling conference be held following a ruling by the Ninth Circuit.

ARGUMENT

I. Defendants mischaracterize the history of this case and would penalize Plaintiffs for adhering to Defendants' cross-use agreement.

In their Opposition, Defendants criticize Plaintiffs for respecting Defendants' request to avoid duplicative discovery, and utilize the discovery exchanged in the other pending actions. (Opp. at 6.) Plaintiffs agreed to Defendants' request and carefully reviewed all discovery requests and responses served and documents produced in the other pending actions. Defendants claimed privilege (both deliberative process and executive) over a host of requested documents and information. Plaintiffs have attempted to use the discovery process in this case to inquire into subjects not covered by requests served in the other actions (or to which Defendants have not adequately responded), but without a ruling from the Ninth Circuit to clarify the parameters of Defendants' claims of privilege, Plaintiffs' options are limited.

Defendants attack Plaintiffs' recent requests as belated (Opp. at 3); however, Plaintiffs' diligence in ensuring that Plaintiffs' requests were comprehensive and in the spirit of the cross-use agreement – requested by Defendants – should not be held against them. Further, Plaintiffs' first set of requests for production are not, as Defendants' claim, fraught with requests that would "duplicate efforts." (Opp. at 8.) In fact, Defendants recently agreed to produce an additional ~1,200 documents in response to Plaintiffs' requests.

Defendants also assert that Plaintiffs have been idle in noticing depositions. (Opp. at 3.) But noticing depositions now when such important privilege issues are on appeal would risk Defendants having to produce witnesses more than once despite the intent of the cross-use agreement. Plaintiffs intend to proceed with depositions – in coordination with plaintiffs in the other pending cases – when document discovery is complete or near complete and the privilege issues are adjudicated.

Finally, Defendants argue that vacating the schedule as has been done in *Karnoski* will somehow prejudice Defendants. (Opp. at 6-7.) It will not. If Defendants believe that Plaintiffs discovery requests are over burdensome or somehow violate the common-use agreement, then they can raise those issues with the Court. But there is no basis for them to contend that they will suffer any prejudice simply because the schedule is vacated.[1] In truth, the only parties at risk of prejudice are Plaintiffs, who could be foreclosed from meaningful participation in discovery and depositions should the current case schedule remain.

II. Defendants ask this Court to ignore the issues on appeal in *Karnoski*.

Defendants contend that the circumstances in *Karnoski* are materially different than they are here. (Opp. at 7.) Yet, prior to their agreement with Plaintiffs in *Karnoski*, Defendants offered to vacate the case schedule in this action before insisting on set schedule.

While Defendants' argue that the decision in *Karnoski* was made under "far different circumstances" (Opp. at 7), the cross-use agreement mandates that the discovery issues in *Karnoski* necessarily are relevant here. As discussed above, the parties across all four challenges to the ban are subject to a cross-use agreement for which Defendants' actively campaigned. When served with requests for production in other cases, Defendants asserted broad privilege, and when the District Court for the Western District of Washington compelled the government to produce (*Karnoski v. Trump*, Case No. 17-cv-01297-MJP, *Order Granting Plaintiff's Motion to Compel*, ECF No. 299 (July 27, 2018)), Defendants filed their petition for Writ of Mandamus in the Ninth Circuit Court of Appeals.

[1] In the meet and confer process leading to the Motion, Plaintiffs even offered to hold any discovery disputes in this case that may be related to the issues on appeal before the Ninth Circuit in abeyance pending its ruling so as to address any concern about "duplicative disputes," but Defendants declined such a compromise.

Defendants "cannot have it both ways" (Opp. at 8), invoking the cross-use agreement when it is advantageous while also seeking to deny the import of that agreement for their own strategic advantage.

III. Defendants' stay request is not properly before this Court.

Defendants request that this Court stay the case "pending a ruling by the Ninth Circuit" (Opp. at 7); however, Defendants must request such relief in their own motion and must otherwise demonstrate that they satisfy the applicable standard, which they have not and cannot do here. A party may not use its opposition to a motion as a vehicle for requesting alternative relief. *See Grosvenor v. Qwest Corp.*, 733 F.3d 990, 997 (10th Cir. 2013) (holding "[a]rguments asserted in response to a motion are generally not considered requests for an order"); *Ayvazian v. Moore Law Group*, Case No. 12-cv-01506-ODW-Ex (C.D. Cal. July 3, 2012); *Beach v. U.S. Dep't of Homeland Sec.*, Case No. 08-cv-00420-RGK-FFMx (C.D. Cal. Sept. 8, 2008) (refusing to consider non-movant's countermotion because "it was part of his opposition" and "had not been brought as a properly noticed motion").

In order to request alternative relief, Defendants must bring a motion (1) in writing, (2) by stating with particularity the grounds for seeking the order, and (3) by stating the relief sought. Fed. R. Civ. P. 7. Further, Defendants must meet and confer at least seven days prior to noticing their motion. *See* L.R. 7-3. Defendants have met none of these requirements. Here, Defendants inappropriately request alternative relief in their Opposition. And, Defendants have previously requested a stay and have been denied that relief. *See* ECF Nos. 36, 51, 82, 136. Thus, their request for alternative relief is not properly before the Court.

Defendants' Opposition cites to a single 80-year-old Supreme Court Case, *Landis v. North American Co.*, 299 U.S. 248 (1936). *Landis* addressed whether a district court was empowered to stay proceedings in one suit until a decision was made in another. 299 U.S. at 249. In *Landis*, the Attorney General properly

noticed a motion to stay proceedings and agreed that the law in question would not be enforced until its validity was accessed by the Supreme Court in a related case. *Id.* at 250–51. While the Court held that "viewing the problem as one of power and power only . . . the power to stay proceedings is incidental to every court to control," it went on to state that "[t]he suppliant for a stay must make out a clear case of hardship or inequity" and that "only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255.

Defendants have not laid "out a clear case of hardship or inequity." Unlike the moving party in *Landis*, Defendants here did not properly notice a motion to stay, and importantly, Defendants have made no agreement to delay the enforcement of the ban on transgender military service. Unlike *Landis*, Plaintiffs would be harmed by a stay that would prevent Plaintiffs from engaging materially in the prosecution of this case as other cases that are party to the cross-use agreement move forward with discovery and depositions. Defendants fail to meet the requirements laid out in *Landis* under which "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners." *Id.* at 256. Thus, Defendants' request for a stay should be denied.

CONCLUSION

For the reasons set forth in Plaintiffs' Motion and this reply brief, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion and issue an Order (i) vacating the Amended Order on Joint Stipulation to Modify Case Schedule (ECF No. 145), and (ii) ordering the parties to submit a joint proposal for a revised case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition pending in *Trump v. Karnoski*, No. 18-72159 (9th Cir.).

Dated: May 20, 2019

Respectfully submitted,

LATHAM & WATKINS LLP

By /s/ Amy C. Quartarolo
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